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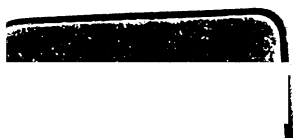
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REPORTS OF CASES

IN LAW AND EQUITY, ARGUED AND DETERMINED IN THE

SUPREME COURT OF GEORGIA,

AT ATLANTA.

Part of January and July Terms, 1876.

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By Act of 1866, (section 4270 of the Code,) the decisions of the Supreme Court are required to be announced by written synopses of the points decided. The decisions thus announced from the bench by Judges BLECKLEY and JACKSON, are made the head-notes to the cases. The decisions announced by Chief Justice WARNER are published as his opinions, the head-notes being made by the reporter. All other head-notes by the reporter are designated by (R.)

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CASES ARGUED AND DETERMINED

IN THE

Supreme Court of Georgia,

AT ATLANTA.

JANUARY TERM, 1876.

PRESENT—HIRAM WARNER, CHIEF JUSTICE.
L. E. BLECKLEY, JUDGE.
JAMES JACKSON, “

MICHAEL H. LEE *et al.*, plaintiffs in error, *vs.* SALLIE TUCKER *et al.*, defendants in error.

Where a deed conveys property for the use, etc., of P., the children she now has, and those she may hereafter have by her present husband, and the *habendum* clause states the tenure to be for P., her heirs and assigns:
Held, that P. took a joint interest with her children and not a fee simple estate.

Estates. Deeds. Before Judge JAMES JOHNSON. Muscogee Superior Court. May Term, 1875.

Reported in the decision.

PEABODY & BRANNON, for plaintiffs in error.

BLANDFORD & GARRARD; R. J. MOSES, for defendants.

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WARNER, Chief Justice.

This was an action of ejectment brought by the plaintiffs against the defendants, to recover the west half of a certain described city lot in the city of Columbus. On the trial of the case, the jury, under the charge of the court, found a verdict for the plaintiffs for three-fourths of the premises in dispute, and \$267 00 for *mesne* profits. The only question made here, was as to the proper construction to be given to the deed under which the plaintiffs claimed title.

It appears from the evidence in the record; that on the 29th of November, 1854, Hicks, in consideration of the sum of \$800 00, conveyed the lot in dispute to Barber, as trustee for Mary Persons, wife of Malcolm Persons, "for the use, benefit and advantage, and in trust for the said Mary Persons, the children she now has, and those she may hereafter have by her present husband, free from the control, or disposition of her present or future husband. To have and to hold the said bargained premises unto the said Barber, trustee, for said Mary Persons, her heirs and assigns, to her and their own proper benefit and behoof forever in fee simple." It was also proven at the trial, that the three plaintiffs were the children of Malcolm and Mary Persons, and that the oldest child was twenty-seven years of age. The court charged the jury "that under the deed from Hicks to Barber, trustee, for Mary Persons, the said Mary Persons was a tenant in common with her children, and if the jury believe from the evidence, that the said Mary Persons had three children living, then the interest of said Mary Persons in said premises, was one-fourth undivided interest." To which charge defendants excepted, and assigns the same as error.

It is insisted for the plaintiffs in error that Mrs. Persons took an absolute fee simple estate in the premises in dispute, under the deed of the 29th of November, 1854, and not a joint estate with her children as tenants in common. In our judgment, the deed from Hicks conveyed the premises in dispute to Barber, to hold the same in trust for the use, benefit

and advantage of Mary Persons and her children, including those she then had, as well as those she might thereafter have by her then present husband; that Mary Persons took only a joint interest with her children in the property conveyed. The property was conveyed to the trustee for two purposes: first, to protect the wife's interest in it against the marital rights of her husband; and, second, to hold it for the use, benefit and advantage of Mrs. Persons and her children, who were to be the joint owners of it, including such children as she might thereafter have by her then present husband, and when the objects and purposes of the trust had become executed, the *cestui que trusts* would be entitled to the possession of an equal share thereof. If there were three children, they would be entitled to three-fourths of the property, and their mother to one-fourth of it. The word heirs in the *habendum* of the deed, was intended to mean the children of Mrs. Persons, and should be so construed when taken in connection with the other words contained in it. There was no question raised on the trial that the objects and purposes of the trust had not been fully executed, or that there was anything more to be done by the trustee, which would make it necessary for him to retain possession of the property. In view of the evidence contained in the record, we find no error in the charge of the court to the jury.

Let the judgment of the court below be affirmed.

MOSES DRIVER, plaintiff in error, vs. WILLIAM A. MAXWELL, administrator, defendant in error.

1. If, in the affidavit to obtain a distress warrant, a definite sum is claimed to be due for rent, the time when it became due need not appear, nor need the terms of the rent contract be set out, such as that the rent agreed upon was a part of the crop, etc. If these facts become material in any stage of the litigation, they may be proved, and it will be no variance.
2. In this state, the burthen of keeping the premises in repair is generally on the landlord, but patent defects existing at the time of the renting, and equal-

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ly well known to both parties, are not to be amended by him, or at his expense, without a special undertaking. On the other hand, the tenant is not obliged to amend them without a like undertaking on his part.

3. Where the rent reserved is one-third of the corn and one-fourth of the cotton raised on the premises in the given year, and at the time of the renting both parties know the fence to be in a very bad condition, too low or too weak to keep ordinary stock from trespassing on the crop, and nothing is said about building it higher or repairing it, there is no legal obligation upon either party to make the fence better. The crop is at the mutual risk of the landlord and tenant, each to the extent of his interest, and whatever part of it may be destroyed by stock in consequence of the fence not being good, is a common loss. The landlord is entitled to his proportion of what is saved but to nothing for what is lost, and so of the tenant.

JACKSON, Judge, dissenting :

1. If the verdict of the jury be right under the evidence, this court should not set it aside, though there may be errors in the charge of the court.
2. This oft-repeated rule of this court should be more rigidly adhered to where the case against the plaintiff in error is made out by the testimony of an impartial witness, and his case supported only by his own evidence.
3. The fact that plaintiff in error made no motion for a new trial in the court below, but brought the case here directly on alleged errors in the charge, ought further to strengthen the application of this wise rule.
4. Whilst, by a strict construction of section 2284 of the Code, it is the duty of the landlord to keep in repair even the fencing around the farm rented, yet he is not bound to watch the fence and see that it is kept up. That duty devolves on the tenant, who may repair himself and charge the landlord with it, to be accounted for in the rent, or notify the landlord that the fencing needs the repair.
5. If both parties know that the fencing is defective at the time the farm is rented, the contract is made with reference to its condition at that time; unless there be an express contract therefor, the landlord is bound to put it in no better condition; the tenant will be held to rent with his eyes open, and will be bound for the whole rent agreed to be paid, no matter how defective the fence was and what depredations hogs or cattle or storm or sickness made upon it.
6. If the tenant see his crop destroyed by cattle without either fixing the fence himself or notifying the landlord to do it, he neglects a plain duty, which both common sense and the law of self-preservation, as well as the sensible construction of the law of the land, impose upon him, and he and not the landlord should suffer for such gross neglect.
7. When the only proof for the tenant, he himself being the only witness, is injury to his crop in its gathering, arising from sickness of those who gather it, storms in wasting it, and cattle and hogs who prey upon it, and he furnishes no data on which it is possible for a jury to predicate a conclusion in respect to how much injury the crop sustained by the breaking in through

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a defective fence, of the cattle and hogs and the proof of the landlord is that of a disinterested witness, fully sustaining the verdict of the jury, the verdict should stand for these, if all the other reasons given be untenable.

Landlord and tenant. Distress warrant. Pleadings. Before Judge CLARK. Sumter Superior Court. October Adjourned Term, 1874.

For the facts, see the opinions.

JOHN R. WORRILL, for plaintiffs in error.

C. F. CRISP; N. A. SMITH, for defendant.

BLECKLEY, Judge.

1. The affidavit for distress warrant was for a definite sum alleged to be due for rent, but did not disclose when it became due, or set forth the terms of the rent contract. The plaintiff gave evidence of a contract, not payable in money, but in a part of the crop—one-third of the corn and one-fourth of the cotton to be raised on the premises in the year 1873. With this and some other evidence, a part of it tending to prove the quantity and value of the corn and cotton raised, the plaintiff closed; and the defendant thereupon moved for a non-suit, because it was not averred in the affidavit that the sum distrained for was due, and because there was a variance between the testimony and the facts alleged in the affidavit. The affidavit showed substantially that the amount claimed was due. It failed to show when it became due, but that is not required. Neither is it necessary to set forth the rent contract. What is required is laid down in section 4082 of the Code, and this affidavit conformed to all the provisions of that section. Whatever of detail was relevant in any stage of subsequent litigation, was admissible evidence without other or fuller pleading than the affidavit as it was. All that "any person who may have rent due," is required to swear, in order to obtain a distress warrant, is prescribed; and whoever goes that far is entitled to prove the actual facts of his

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case when he is met and resisted with an issue. The motion for a non-suit was properly overruled.

2. The Code, section 2284, introduced a new rule on the subject of keeping rented premises in repair, devolving the burden on the landlord instead of upon the tenant, where it rested by the rule of the common law. This statutory obligation of the landlord has been frequently considered by this court; 48 *Georgia Reports*, 172; 49 *Ibid.*, 272; 38 *Ibid.*, 542; 39 *Ibid.*, 210; *Whittle vs. Webster*, 55 *Ibid.*, 180. Generally, no doubt, where full rent is reserved, the landlord is to be understood as letting his property in a condition reasonably fit for the purpose for which it is intended to be used, and as binding himself to keep it in that condition, on proper notice from his tenant, by making necessary repairs, or authorizing them to be made at his expense. But where the premises, by reason of patent defects, known alike to both parties, are, at the time they are offered for rent, out of repair and unfit for safe or comfortable use, the tenant ought to reject them if he is not satisfied to accept them as they are; and if he does accept them, no matter what price he agrees to pay, the landlord, in the absence of a special undertaking to do more, should be held for such repairs only as become requisite to keep the property in as good condition as when it was rented. He may well say to the tenant, "you knew what you got; I offered my property as it was, and did not hold it out to you for more than it was." In such a transaction all the conditions of fair dealing would be met and satisfied. On the other hand, however ruinous and dilapidated the property might be, the tenant, without some special undertaking on his part, no matter at how cheap a rent he was admitted into possession, would be under no legal obligation to make any repairs or to call for any; certainly he would be under no duty to his landlord to make or call for any which the latter knew were needed at the time of entering into the rent contract. Surely the tenant would be at legal and moral liberty to remain quiet so long as the premises were in as good a condition as when he received them. That much was

his privilege under the old rule of law, when he himself had to make repairs. He was bound for such repairs only as were requisite to maintain the *status quo*; in some cases, perhaps, not for that much.

3. If these views are correct, their application to the present case is not difficult. The contract of renting was made with the tenant by an agent of the landlord. It was for one year, 1873, and the landlord's compensation was to be one-third of the corn and one-fourth of the cotton raised on the premises. It is not shown to have been in writing—the presumption is it was in parol. The agent of the landlord testifies that the fence was in very bad condition, insufficient to turn and keep off ordinary stock from destroying the crop; that plaintiff and defendant both knew it at the time of the renting, and that nothing was said as to who should put the fence in condition to protect the crop. The tenant testifies that nothing was said as to who was to put the fence in condition to protect the crop; that all the parties knew the fence was no account, and would not turn any kind of stock; and that in many places a man could step over it with ease. In relation to the crop made, its value, and what became of it, the agent testifies, that the corn raised was something like one hundred and thirty or one hundred and forty or one hundred and fifty bushels, worth \$1 00 per bushel; and the cotton something like three or four bales; that good cotton was worth some thirteen cents per pound, but this was very poor, because the tenant and his hands, being sick in the fall, did not gather the crops till late, and the storms and the stock injured them very much. The tenant testifies that he raised about four bales of cotton, and about one hundred bushels of corn; that about forty bushels of the corn was destroyed by hogs and cattle; that the cattle destroyed all the cotton except two bales, of four hundred pounds each; that the cotton was rather poor, on account of bad weather and the cattle running over it before it was gathered; and that he sold it for eleven cents per pound, which was the best price he could get. He testifies further, that

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the rent corn and cotton were to be delivered on the premises; that he put up the rent corn, thirty-three bushels, in a crib, as agreed, and that he tendered to plaintiff's agent one-fourth of the cotton, in the seed, which the agent declined to receive, requiring it to be ginned, baled and delivered in Americus. It does not appear what finally became of the corn put up as rent. The presumption is that the cotton tendered in the seed was afterwards ginned, and formed a part of the two bales sold.

On the facts in evidence there was no legal obligation upon either party to make the fence better. Both knew of its condition, and neither stipulated to make repairs or to be chargeable with them. The crop was at the mutual risk of the parties, to the extent of such interest as each had in its preservation. Whatever was lost by reason of the bad fence was as if it had not been produced. Neither party was bound to make the loss good to the other. There is no evidence that the fence deteriorated or became in a worse condition than when the parties contracted. Its then insufficiency continued, and there is no evidence of any fault or default on the part of either landlord or tenant. Both parties risked the fence just as they did the soil and the seasons. What the ground would produce and the fence secure they were to divide; what the weather or the cattle destroyed was gone beyond recovery and gave no right to compensation.

The court's charge to the jury was erroneous in so far as it departed from this theory of the law; and inasmuch as the verdict could have been for less than it was, consistently with the evidence, if a correct charge had been given, the judgment is reversed and a new trial granted.

Judgment reversed.

WARNER, Chief Justice, concurred, but furnished no written opinion.

JACKSON, Judge, dissenting.

Tomlinson, as agent for Maxwell, rented certain lands to Driver. At the time of the contract the fences were defective

and both parties knew it. There was no stipulation that they should be made better, and none devolving the duty to repair upon either. The rent agreed upon, with a full knowledge of the condition of the fence, was one-third of corn and one-fourth of the cotton *made on the place*.

The plaintiff proved that from one hundred and thirty to one hundred and fifty bushels of corn and three or four bales of cotton were raised on the place; that corn was worth one dollar per bushel and cotton thirteen cents per pound. This proof was by Tomlinson, who had no interest in the case.

The defendant proved by himself that he raised on the place four bales of cotton and one hundred bushels of corn; that about forty bushels of corn was destroyed by the hogs and cows; that the cattle destroyed all the cotton except two light bales weighing four hundred pounds each; that on account of bad weather and the cattle running over the cotton before it was gathered, it was rather poor, and he had sold both bales at eleven cents per pound; that defendant measured plaintiff his full portion of corn due according to said contract and put it in a crib to itself, and also cotton fully one-fourth, and put it to itself; that the corn actually measured and cribbed for plaintiff, was thirty-three bushels; that storms came, and the place was very sickly and the weather bad, and hogs and cattle trespassed on the crop and prevented its proper gathering. The court charged the jury and they found for plaintiff \$99 50.

I think that the jury found right. I have doubt that they believed the defendant's story. I doubt that they ought to have believed it. At one breath he swore that the cattle destroyed all the cotton except two light bales, exactly four hundred pounds each, and these he carried to Americus and got eleven cents a pound for. In the next breath he swore that he put the landlord's part of the cotton, *fully one-fourth*, he swears, to itself, and kept it for him. At one breath he swears that he made one hundred bushels of corn, and the cattle eat up forty bushels of it. At the next, that he cribbed exactly thirty-three bushels for the landlord. His whole de-

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fense is that he was blockhead enough to rent a piece of land so poorly fenced that when he rented it he knew it would not turn cattle or even hogs; and yet when cattle and hogs were depredating upon it, though he thought it was the landlord's duty to repair and keep them out, he suffered the crop to be destroyed rather than notify him or his agent.

I repeat that I cannot find it in my heart to condemn the jury for the verdict they rendered. It seems to have been moderate; it was only \$99 50. The proof fully authorized it, and I think it should stand, though the court may have erred upon questions of law, as this court has ruled so often that if I undertook to enumerate the cases it would spin this opinion into a yarn unendurably long. Especially, when no motion is made for a new trial, should this oft-repeated rule be adhered to, and still more should it prevail in a case where no human being—no neighbor, no son, no employee—witnessed the destruction wrought upon this man's crops by the storm and the sickness, the hogs and the cattle, except himself! And when even he, who can pack two light bales of cotton with so much accuracy that neither of them shall weigh more than just exactly four hundred pounds, cannot or does not tell the jury how much of the crop was destroyed by each of these calamities—sickness, storms and cattle! It would require wonderful skill in ciphering to determine from the premises given by his testimony exactly how much corn and how much cotton each of these causes of ill luck produced, unless, indeed, it be the law that the landlord shall warrant not only a good fence but no sickness and no storms. How any jury could cipher out an approximation to a proper deduction to be made from the landlord's rent from these cattle, damage *feasant*, all mixed with the sickness and storm in uncertain proportions, I cannot imagine, and if it be demanded that they shall apportion such damage between landlord and tenant, the beginning would surpass the skill of Kepler or Sir Isaac Newton. I shrink from putting such a task upon a jury, and for this reason I dissent from the judgment of the court.

But has any substantial error been committed by the court below? Let us see. Two errors are assigned: first, his refusal to charge as requested; secondly, the charge given. He was requested to charge as follows: "That in making the contract of rental between plaintiff and defendant, if nothing was said about necessary repairs, and who should keep the premises in suitable repair for cropping in said year 1873, for which said contract was made, the plaintiff should have kept said premises in repair, and if the crops, or a portion of the same, was destroyed by cows and hogs, for want of proper repairs done on the fence around said premises, that plaintiff could not recover if the amount destroyed was equal to what his portion of the crops would have been."

This request would announce the law, that the landlord, without notice, must see to it that the fence around the place he rents is good and kept good all the year. I do not understand that my brethren hold this extreme view. If pronounced law, it would unsettle all the ideas the profession entertain of it, and would plunge the relation of landlord and tenant into as much confusion and difficulty as a jury would encounter in settling the contest for supremacy between storm and sickness and cattle, without any *data* being furnished to show which did the most damage. The landlord may live a hundred miles off. It makes no difference. He must move in the neighborhood of the place he rents, or hire somebody to go around it all the year, every week or two. It has always been thought heretofore to be the duty of the cropper to take care of his crop, and as the easiest way of doing it to go round his fence occasionally and mend the rails which break or rot, and put up the fence if storms have blown it down or hunters have left it down.

But the second error alleged against the court below is the charge he did give. What is that? It is "that if defendant rented land from plaintiff with a bad fence around the premises at the time of renting, and a large portion of the crop was destroyed by hogs and cows by reason of said defective fence, yet defendant was liable to pay full rent for the prem-

ises unless there was an express contract at the time of rental that plaintiff was to repair the fence; that plaintiff was not required to keep the fences in repair if the fences were not in repair at the time of renting; that if defendant failed, for any cause, to gather the crops in proper time, and the same were injured and damaged, that defendant was still liable to pay plaintiff rent for the amount of corn and cotton made on the place." This charge, when we look at it in connection with the request which preceded it, and when we analyze it, means this: that when the fence is defective when the farm is rented, and the tenant sees it and knows the defect, he makes his bargain in reference to its then condition; he agrees to pay so much rent for it as it stands, and the landlord is only bound, on notice, to keep it as good as it was; he should have notice if it gets worse, and if, as in the case at bar, the tenant fail to give any notice or to keep the fence in the condition it was, and for any cause, by cattle or storm or sickness he fail to gather it, he still must pay rent for what he makes. His contract is to pay one-fourth and one-third of cotton and corn he makes. To make, means to gather and house, to fit it for use or market. If after he lays by the crop, for want of keeping up the fence himself and charging the landlord for it, or for want of notice to the landlord; if for this neglect of a most reasonable duty on his part, the crop is lost or destroyed in whole or in part, he should still pay the rent. And such I take to be the meaning of the statute, (Code, sec. 2284.) It makes him liable to keep the premises in repair. What repair? The repair they were in when he rented them. Who will know if they get out of repair? The tenant, because he occupies and uses them. How shall the landlord know? By notice from the tenant; he is absent, he can know in no other way. It is no hardship on the tenant to notify him; it is a hardship on him to visit the tenement or farm and pry out leakages or deficient fences. There is no evidence in this record that this tenant ever notified the landlord when this fence got worse, if it did. It is probable that it did get so from the wind and storm and the natural

decay. No damage is complained of till the gathering of the crop, and the storms poured and the winds blew and the sickness came about that time, and the fences fell then, most probably because of the storms, and were not repaired because of the sickness. This construction accords, too, with the decisions of this court, that notice must be given by the tenant in such a case, or he must repair and charge the landlord and take it out of the rent. The duty is on the landlord to keep in repair, but the duty is on the tenant to inform him when it is needed. It was so decided in *Vason vs. City of Augusta*, 38 *Georgia Reports*, 542, and again held in *Whittle vs. Webster*, 55 *Georgia Reports*, 180. In the latter case the chief justice said what I say here: "If a tenant should rent a dilapidated or leaky store-house, with full knowledge of its actual condition, at a reduced price in consequence thereof, and puts his goods therein, and the same are damaged, he would not then have any legal or just cause of complaint against his landlord." And again, he said, "and, if after the premises have been rented, the same become unfit by reason of the roof of the house becoming leaky, or other similar cause, so as to render the house unsuited for the purpose for which it was rented, the landlord is bound, upon notice being given to him of the defect by the tenant, to make the necessary repairs within a reasonable time thereafter, and upon his failure to do so, and damage results to the tenant's goods in consequence of such failure to make the necessary repairs, the landlord will be liable therefor."

In this opinion Judge BLECKLEY and myself concurred. I adhere to it, *the tenant must give notice to the landlord to repair*. The rule, just everywhere, is the more expedient in the farming operations of our people.

It becomes all important in cases of this sort not to extend or expand the rule one *iota* in favor of the tenant. As a practical question, it pervades the state and its great agricultural interests every where; and it is all-important, in my judgment, so to construe the act as to require the tenant to notice his fences and tell the landlord that they need repair,

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or hold him responsible for his neglect. For these reasons I dissent from the judgment of this court, and would affirm that of the court below.

SARAH J. BOYD, plaintiff in error, vs. ALEXANDER CHAPPELL, defendant in error.

When vendor sold lands to vendee and gave bond for titles and possession, and part of the purchase money having been paid, made a deed thereto after obtaining judgment for the balance of purchase money under section 3586 of the Code, and the wife of the vendee filed an equitable plea that her husband, in the payment made, had used her money with the knowledge of the vendor, and had made her a deed to the land, and she prayed that the verdict and the judgment should be so moulded as to protect her rights and give her the land, or if sold, enough of the proceeds to reimburse her, but did not allege in the plea, or prove on the trial, that the vendor was insolvent, or that for any other reason she could not sue and recover from him :

Held, that while she may recover from the vendor the money so applied with his knowledge, she has no equitable claim to the land, or lien thereon, or on its proceeds, or any part thereof, until all the purchase money has been paid, the vendor being solvent and able to respond to her for her money so received by him, should she see fit to sue therefor.

Claim. Vendor and purchaser. Husband and wife. Before Judge CLARK. Walker Superior Court. September Term, 1875.

Reported in the opinion.

JOHN R. WORRILL, for plaintiff in error.

GUERRY & SON, for defendant.

* JACKSON, Judge.

Alexander Chappell sold a tract of land to Uriah Boyd. Boyd paid one-half of the purchase money, \$600 00. Chappell sued and recovered judgment for the other half, and having made Boyd a deed to the land, a bond for titles having

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been given therefor, levied the *fi. fa.* for the balance of the purchase money upon it. Mrs. Boyd set up an equitable claim on the ground, that with the knowledge of Chappell, her husband had used her money in paying the first \$600 00 thereon, and had made her titles thereto; and she prayed that the land be decreed to be hers, or at all events, that when sold, the first \$600 00 of the sum it sold for, with interest thereon, be paid to her. On the trial of the case the court charged the jury to the effect that if they believed, from the evidence, that the money of the wife was applied by the husband to his debt for the land, with the knowledge of the vendor, that she had a good claim against the vendor for the money so applied, but that unless it was alleged and proved by her in setting up her equitable right to the land or the proceeds, or part of the proceeds thereof, that the vendor was insolvent or otherwise unable to respond to her for the money so received by him knowing it to be hers, she had no equitable claim to the land or lien upon it, or any of the proceeds thereof until the purchase money was all paid. The jury found the land subject; and the error complained of is the charge of the court, and its sequence, that the verdict is against the law of the case. On the question of the vendor's knowledge that the money was the wife's, there is conflict; on the other, of the want of an allegation and proof of his insolvency, there is none. It is not alleged in the plea, nor was it proven or attempted to be proved, that the vendor was insolvent. So that the naked question here, is, was it necessary that Mrs. Boyd should allege and prove Chappell's insolvency, in order to charge this land in this case with her debt against him? In the case of *Humphrey vs. Copeland*, 54 *Georgia Reports*, 543, it was held that a creditor who received the wife's money for a debt due him from the husband, knowing it to be hers, acquires no title thereto. Whether the principle there laid down would apply to this case, it is not necessary to decide. Apparently it would. If so the wife may sue Chappell and recover her money back from him. But the question here is, can she charge this land with it unless all

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the purchase money has been paid? Had it all been paid and the title been made to her husband, a trust would have resulted to her, unquestionably, and he would have held the land as her trustee, and she could have asserted her right thereto, at law or in equity under our pleading; but here the title was in Chappell until he made a deed to Boyd under our statute for the purpose of selling the land and making the balance of the purchase money: Code, section 3586. That section of the Code provides that the proceeds of the sale shall be *first* appropriated to the payment of the balance of the purchase money. It is difficult to see what prior right anybody could acquire to land or money so situated and raised, if we regard the plain purport of the statute. If the wife showed that she could get her money in no other way, that the man who owed her was insolvent, that there was nothing out of which he could pay her but this land, and prayed that the money going to him, might be paid to her as the only way of securing her debt, then it strikes us there would be equity in her plea and its prayer. And so, in substance, the court charged, and thereupon the jury found, as they were obliged to do, under the facts, that there was no proof of Chappell's insolvency. We think the charge and the verdict in accordance with the law of the case.

Judgment affirmed.

BURRUS & WILLIAMS, plaintiffs in error, vs. KYLE & COMPANY, defendants in error.

1. The discretion of the court in refusing to allow leading questions on cross-examination, will not be controlled unless abused; especially where the witness is one of the parties to the suit in whose interest the questions are propounded.
2. Where cotton was delivered by a debtor to an agent of factors, and placed upon their drays to be transported to their warehouse, their lien for advances, etc., at once attached, and was superior to the lien of an attachment levied whilst the cotton was in process of transportation to such warehouse.

Witness. Practice in the Superior Court. Factor's lien. Attachment. Before Judge CRAWFORD. Muscogee Superior Court. November Term, 1875.

Reported in the decision.

LITTLE & CRAWFORD, by brief, for plaintiffs in error.

PEABODY & BRANNON, for defendants.

WARNER, Chief Justice.

This was a claim case, on the trial of which the jury, under the charge of the court, found the property subject to the attachment levied thereon. The case comes before us on a bill of exceptions to the rulings of the court during the progress of the trial, and to its charge to the jury. It appears from the evidence in the record that on the 30th of September, 1874, the plaintiffs' attachment was levied on six bales of cotton as the property of Reese, the defendant therein, which was claimed by Burrus & Williams, cotton factors and warehousemen, in the city of Columbus. It also appears from the evidence that Reese lived in the state of Alabama; that he was indebted to the claimants \$600 00 or \$700 00 for advances made to him to make his crop for the year 1874, they having a mortgage on his crop to secure the payment thereof. Some time previous to the day on which the attachment was levied, the claimants had requested Reese to send forward his cotton, which he promised soon to do. On the morning of the 30th of September, 1874, Reese informed the claimants that he had six bales of cotton coming through the country, which would arrive in the afternoon of that day, the same being part of his crop, and proposed to pay the same to the claimants on account of his indebtedness to them, and said that he had learned that one Murphy had threatened to levy an attachment on his wagons and teams to satisfy a demand that was unjust, if he brought them on the Georgia side of the river. It was then agreed between Reese and the claim-

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ants that on the arrival of the cotton in Girard, Alabama, they should send their drays over there and he would deliver to them the six bales of cotton, which they were to sell, and put the proceeds of sale to account of his indebtedness to them for the year 1874, which indebtedness exceeded the value of the cotton. The claimants sent Tilman, with their drays, over on the Alabama side of the river, and the cotton was delivered to them, and placed on their drays and brought across the river, and when on its way to their warehouse, was levied on by virtue of the plaintiffs' attachment. The delivery of the cotton was made in pursuance of the agreement made with Reese in the morning, that claimants were to sell it, and credit Reese with the proceeds thereof, and were to account to him by notifying him of the amount thus credited; claimants knew nothing of plaintiffs' attachment until it was levied. Reese testified that he was indebted to the claimants \$600 00; the debt was contracted in June, 1874, for provisions to run his farm, and was secured by a mortgage lien on the cotton; that he paid the claimants six bales of cotton on his indebtedness to them on the 30th of September, 1874, in Alabama, having promised to pay them with the first cotton he made; the payment was made previous to the arrival of the cotton in Georgia; that at the time the cotton was attached by the plaintiffs it belonged to the claimants, and was in their possession, he having delivered it to them in Girard, Alabama, and it was put upon their drays there, was transferred from his wagons to the claimants' drays; that he had no knowledge of the plaintiffs' attachment at that time. Tilman testified that he was in the employment of the claimants, and by their directions went over the river with the drays and received the cotton for them from Reese's wagons, and brought it on this side of the river, when it was levied on by plaintiffs' attachment. The plaintiffs in attachment having disclaimed any right to recover on the ground of any fraud in the transfer of the cotton between defendant and claimants, the court charged the jury: "If you believe from the evidence that the six bales of cotton were received by Burrus & Williams, the claimants, and were by

them to be sold, and the amount received therefor was to be credited on Reese's account when so sold, and that whilst the cotton was on its way to their warehouse, and before this was done, the attachment was levied, then the cotton would be subject, because in such a case as that they would only be the agents of Reese to sell, and when sold, then they could appropriate the proceeds to the payment of his account. But, if the value of the cotton was agreed on, and it was delivered as a payment, and nothing remained to be done, except to ascertain the weights, then the payment was a good one, and it is the property of the claimants, and not subject to the attachment, it being necessary that the price should be agreed on to make it a payment." It appears from the bill of exceptions that on the cross-examination of Williams, the plaintiffs' witness, the claimants counsel proposed to ask him the following question: "Was not the agreement between you and Reese that you were to take the cotton and credit it upon Reese's indebtedness to your firm?" The claimants' counsel also proposed to ask the same witness, on his cross-examination, the following question: "Who was the owner of the cotton at the time it was levied on?" The court refused to allow the questions to be answered by the witness as propounded, but stated he would allow the counsel to ask the witness what was the agreement between the witness and Reese touching the six bales of cotton levied on, and would also allow the witness to state all the facts connected with the ownership of the cotton, whereupon the claimant excepted.

1. We find no error in the refusal of the court to allow the questions propounded to the witness to be answered, but think the discretion of the court was properly exercised under the provisions of the 3865th section of the Code, the more especially as the witness was one of the parties to the suit.

2. But in our judgment the charge of the court to the jury was error, inasmuch as it ignored the claimants' lien on the cotton or its proceeds, as factors in *possession* thereof. The claimants were factors and warehousemen, and Reese, the defendant, was indebted to them for advancements made by

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them to him as factors and warehousemen. The delivery of the cotton to Tilman, their agent, by Reese, in Girard, and the placing it on the claimants' drays, to be hauled to their warehouse, was, in contemplation of the law, a delivery to them, and they were in possession of the cotton as factors and warehousemen who had made advances to Reese to enable him to make it: *Elliott vs. Cox*, 48 *Georgia Reports*, 39; *Hardeman & Sparks, vs. De Vaughn*, 49 *Ibid.*, 596; *Clark & Cole vs. Dobbins*, 52 *Ibid.*, 656. The claimants, as factors and warehousemen, had a lien on the cotton in their possession not only for the expenses incurred by them in handling it, but also for all balances due to them by Reese on general account: Code, section 2111. The evidence in the record is that the indebtedness of the defendant, Reese, to the claimants for advances made by them to him, exceeded the value of the cotton.

Let the judgment of the court below be reversed.

FRANK PHILLIPS, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

The only evidence of the prisoner's connection with the burglary being that he was seen to pass by the house some hours before the offense was committed, and that several months thereafter, goods stolen from the house on the occasion of the burglary, were found in his possession, the case made is sufficiently answered by evidence of previous good character and the testimony of an unimpeached witness that the goods were delivered to the prisoner by another person in pledge for a sum of money, the prisoner himself having given substantially the same account of his possession and no contradictory account.

Criminal law. Burglary. Circumstantial evidence. Before Judge HOPKINS. DeKalb Superior Court. September Term, 1875.

Reported in the opinion.

HOWELL C. GLENN, for plaintiff in error.

JOHN T. GLENN, solicitor-general, for the State.

BLECKLEY, Judge.

Burglary was committed by some unknown person. The occupants of the house were absent, having left at about one hour before sundown, and having returned the next day about one o'clock in the afternoon. During this absence some one entered the house by removing from a nail the end of a string which secured the door, stole therefrom five quilts worth \$20 00, and went away, leaving the door fastened as it was before. This was in March. In July thereafter, four of the quilts were found in the prisoner's house. The fifth had not been discovered up to the time of the trial. Prisoner's house was searched under a search warrant, and the quilts found—two in a chest and two in a trunk. He was absent at the time, but his family were there. The account he afterwards gave of his possession, and the one given to the jury in his statement at the trial, was that he received the quilts from Tom Jones, for \$5 00 which he let Jones have, the arrangement being that they were to be returned if the money was refunded, but otherwise, they were to be his property. He proved by his half-brother that this account of the matter was true, and four or five witnesses testified to the prisoner's good character. There was no evidence to the contrary of this, nor was the brother either impeached or contradicted. It appeared that about twelve o'clock of the day upon which the prosecutor left his house, the prisoner passed near it, along the road; and that circumstance, with the possession of the stolen property, was all that went to show his connection with the burglary. He and the prosecutor both lived in the country, about one mile and three-quarters apart.

The circumstance that the prisoner passed along the road, by the prosecutor's house, about twelve o'clock in the day, is of little or no weight against him. The prosecutor remained at home until an hour before sundown, and up to that time no crime was committed. The house stood on the roadside,

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and, slightly fastened as it was, might have been entered by any one who chanced to pass from the time it was left until one o'clock the next day, when the prosecutor returned to it and found his goods missing. What bears upon the prisoner is that the quilts were found in his house. That is the criminating fact against him. But then they were taken in March and not found till July. That tends to lessen the force of the possession, though, perhaps, considering the nature of the property, its force is not wholly destroyed. Quilts are articles that would be slow to circulate, and in regard to such articles, the possession, to raise a presumption of guilt, need not be so recent as where the property is of a more current kind: 3 Greenleaf's Ev., sec. 32; 1 Phillips' Ev. Cowen & Hill's Notes, 425, note 325. But let it be conceded that the *onus* was cast upon the prisoner to vindicate his possession. He did so by proving by one witness how he acquired it, and by several others that he was a man of good character. In the note above cited from Cowen & Hill, it is said, on page 427, that the better opinion seems to be, that the presumption arising from possession alone is completely removed by *the good character alone* of the prisoner. Certainly good character, together with the testimony of an unimpeached, uncontradicted witness, ought to remove it. It does not appear that the prisoner denied his possession or refused to account for it, or gave any false or contradictory account. The transaction with Jones, as explained by the witness, partook of the nature of both pledge and sale, and when the prisoner said that he bought the quilts from Jones, he stated nothing inconsistent with it. If the prosecution had been for receiving stolen goods, knowing them to be stolen, the conviction might not have been improper, inasmuch as Jones' possession most probably appeared more than suspicious, and the value of the goods was so much above the amount the prisoner gave for them. But in respect to the offense of burglary, there is some doubt, upon the authorities, whether the possession of goods stolen from the building will, of itself, even when recent and unexplained, so identify the prisoner as to justify a

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conviction: 1 Whar. Cr. L., section 729; 1 Parker's C. C., 447; Burrell on Cir. Ev., 455-6; Cowen & Hill's Notes, 432, note 329. It is not clear, upon principle, why it should not, as the perpetrator of arson may be identified by such means, (3 Greenleaf's Ev., section 56,) and as there is a general presumption that the fruits of a crime are with the criminal: 1 Greenleaf's Ev., section 34; 3 *Ibid.*, section 31. As to larceny from the house, see 24 *Georgia Reports*, 32. Upon this question we, at present, decide nothing. What we rule is, that, with the showing made by the prisoner, he was improperly convicted—the verdict was contrary to the evidence, and the court should, on that ground, have granted a new trial.

We advert to the newly discovered evidence only for the purpose of remarking that we are unable to see why full diligence would not have found it out in ample time for the trial.

Judgment reversed.

WILLIAM G. SIMS, plaintiff in error, vs. SHADRACK T. CRAWFORD, executor, defendant in error.

An executor exposed lands of testator to sale; a bidder purchased the same and gave his notes therefor, secured by mortgage on the land. Suit was brought on the notes. Defendant pleaded that by a parol agreement made before the sale, one-half the notes were not to be paid at maturity, but payment was to be delayed till certain children arrived at age, which had not happened; that he had paid part of the purchase money, and when he paid it this understanding was renewed by the executor; that they did not put this agreement in the writing because both parties thought it would be good without doing so, the notes being written as intended, and he prayed that his money be refunded and the executor take back the land. The plea was demurred to and stricken:

Held, that there is no equity in this plea, and that it was properly stricken: Code, sections 2757, 3800.

Pleadings. Vendor and purchaser. Contracts. Before Judge CLARK. Schley Superior Court. October Term, 1875.

Reported in the opinion.

HAWKINS & HAWKINS, for plaintiff in error.

JOHN R. WORRILL; B. B. HINTON; GUERRY & SON, for defendant.

JACKSON, Judge.

At the October term of Schley superior court, Crawford, executor of William Ross, brought suit against Sims on two promissory notes for \$1,736 66 each, secured by mortgage on the lands for which they were given. To this action Sims, among other things, pleaded an alleged equitable plea to this effect: That the lands were sold in 1870, at public outcry, by Crawford, as executor, and bid off by defendant; that before the sale, Crawford agreed with him to let him have the lands for \$5,200 00, with this understanding, that the proceeds were to go to Crawford's wife and Ross' children, half and half; that if defendant would bid off the land at that price and pay him the amount due to the Ross children, the other half should remain unpaid till certain Lawson children were twenty-one years old, to whom Mrs. Crawford intended to give her half; that these children are still minors; that this agreement was left out of the writings because they all thought it would be carried out; that he paid at one time one-third and then \$500 00, which Crawford received and repeated the same assurances; and then the plea prays for a rescission of the contract, and that Crawford take the land back and pay defendant back the money he had received.

This plea was demurred to as having no equity in it; it was stricken, and this is the error assigned. We agree that there is no equity in the plea. It is a naked effort to change a written contract by parol evidence to contradict the written trade, and this without any allegation of fraud or mistake in writing what was intended to be written. It has been ruled again and again that this cannot be done: Code, sections 3800, 2757; 36 *Georgia Reports*, 454.

Judgment affirmed.

JOHNSON & SMITH, plaintiffs in error, *vs.* A. D. WHELOCK,
defendant in error.

The title upon which claimants relied being made as part of a usurious contract, was void, and the property claimed was therefore properly found subject.

Claims. Deeds. Usury. Before Judge KIDDOO. Terrell Superior Court. November Term, 1875.

Reported in the decision.

IRVIN & GRESHAM, for plaintiffs in error.

A. HOOD; HOYLE & SIMMONS, for defendant.

WARNER, Chief Justice.

This was a claim case, on the trial of which in the court below, the jury, under the charge of the court, found the property subject to the execution levied thereon. The claimants made a motion for a new trial on the ground that the verdict was contrary to the evidence, contrary to law, and for alleged error in the charge of the court; which motion was overruled, and the claimants excepted.

It appears from the evidence in the record that Wheelock, the plaintiff in *ft. fa.*, obtained a judgment in Terrell superior court, at the November term, 1874, against Lee & Fulton, on two promissory notes, dated 15th of April, 1873, which *ft. fa.* was levied on certain described lots of land and other property, on the 6th of April, 1875, as the property of Lee & Fulton, which was claimed by Johnson & Smith. The claimants claimed the property under a deed made by Lee & Fulton to them, dated 12th of December, 1872, and recorded 7th January, 1873, and a deed from Lee to them, dated 13th December, 1872, and recorded 7th January, 1873, and also under another deed made by Lee & Fulton, conveying the property to the claimants, dated 20th December, 1872, and recorded 6th of January, 1873. The deeds conveyed an abso-

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lute warranty title to the property levied on to the claimants. The plaintiff's judgment against Lee & Fulton, the defendants, was of younger date than the deeds to the claimants, and the plaintiff sought to subject the property in satisfaction thereof, on the ground that the conveyance of the property was fraudulent in law as against creditors, under the provisions of the 1952d section of the Code, and because the title to the property was void, being made as a part of an usurious contract. The evidence shows that the deeds conveying the property were executed by Lee & Fulton to the claimants to secure them for their indebtedness to the claimants for goods purchased of them from time to time; the claimants did not go into the possession of any of the property until the fall of 1874, or January, 1875; the defendants, Lee & Fulton, after the deeds were made, used the property conveyed just as they did before; the property described in the deeds, was to be conveyed back to Lee & Fulton when their indebtedness to the claimants was paid. It is quite clear from the evidence in the record that the claimants charged the defendants, Lee & Fulton, at the rate of one and a half or two per cent. a month on balances due by them on their accounts; the exact amount of usury paid, does not appear; one witness states that he does not think it was as much as \$5,000 00, but there is no doubt that the rate of interest paid on the indebtedness which the deeds were given to secure, was more than seven per cent., the legal rate of interest. One of the claimants testified, that in a settlement made with Lee & Fulton in January, 1875, \$6,224 00 was deducted from their account, which was more than the amount of usury that had been charged up against them. The law of force in this state at the time the deeds were executed by Lee & Fulton to the claimants, and which is now of force, declares that "All titles to property made as a part of an usurious contract, or to evade the laws against usury are void." See *Sugart vs. Mays*, 54 *Georgia Reports*, 554, and *Carswell vs. Hartridge*, 55 *Ibid.*, 412. In this case, there was no equitable plea filed by the claimants alleging that their deeds were intended to be an

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equitable mortgage for the security of the debt due to them, by Lee & Fulton, but they relied upon their deeds as conveying to them an absolute title to the property. In view of the evidence contained in the record, we find no error in the charge of the court to the jury, or in overruling the motion for a new trial.

Let the judgment of the court below be affirmed.

MARTUS B. WALKER, plaintiff in error, vs. JOHN C. ZORN,
defendant in error.

A count for *mesne* profits in a pending action of ejectment, is a suit to recover money, and the plaintiff, on complying with section 3533 of the Code, may have process of garnishment, as in other cases "where suit is pending."

Ejectment. Garnishment. Before Judge BUCHANAN.
Upson Superior Court. May Term, 1875.

Report unnecessary.

SAMUEL HALL ; WILLIAM S. WALLACE, for plaintiff in error.

A. M. SPEER ; PEEPLES & HOWELL, for defendant.

BLECKLEY, Judge.

The count for *mesne* profits, in an action of ejectment, is a claim for money, and when such an action is pending we see no reason for denying the plaintiff the remedy of garnishment. The Code seems broad enough to embrace all money demands, whether resting on *tort* or on contract: Code, sections 3532, 3533, 3278.

Judgment affirmed.

Gosha vs. The State of Georgia.

WESLEY GOSHA, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

1. An infant under ten years of age cannot consent to sexual intercourse, and the fact that such is her age is conclusive that the act is done forcibly and against her will.
2. The venue of a crime must be established clearly and beyond all reasonable doubt; and where there is no positive proof that the offense was committed in the county of Sumter, but the only proof of the place is that it was within fifty yards of a residence in Sumter county, it does not affirmatively appear with sufficient certainty that the crime was committed within the jurisdiction of the court, and therefore a new trial must be awarded.

Criminal law. Rape. Infant. Venue. Before Judge CLARK. Sumter Superior Court. October Term, 1875.

Reported in the opinion.

ALLEN FORT; J. R. McCLESKEY, for plaintiff in error.

C. F. CRISP, solicitor general, for the state.

JACKSON, Judge.

The defendant was indicted and found guilty of rape. He moved for a new trial, and error is assigned here on two grounds: first, that the court erred in charging that a female child under ten years of age could not consent to sexual intercourse, so as to show that the act was not done forcibly or against her will, there being some proof of her consent; and secondly, because the venue was not sufficiently proven; and these are the two questions the record before us makes.

1. As to the first question, the rule at common law is well established, and we think founded in wisdom: See 4 Blackstone, (Cooley) 210, 212. It has also, in effect, received the sanction of this court: *Stephens vs. The State*, 11 *Georgia Reports*, 238. We shall not disturb it. That rule is, that her tender years concludes the question—she cannot consent.

2. In respect to the second point, we think that it does not appear affirmatively, with sufficient certainty, that the crime

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was committed in the county of Sumter. There is no positive proof in the record of the precise *locus*—the place where it occurred. It was within fifty yards of a residence, and that residence was within the county of Sumter; but there is no proof whether on the line, or near the line, or in the centre, or in what part of the county that residence was. It might have been within twenty yards of the line. We are constrained, therefore, to grant a new trial in this case on this ground, and do so the more readily because we think that the court below was rather severe in the penalty inflicted, twenty years in the penitentiary. The defendant was only some sixteen years old; the girl probably did consent; and while the law renders that no justification, as she was under ten, yet, perhaps, it should so mitigate the crime as to make the punishment lighter. At all events, we give him another opportunity of being heard before the jury and of appeal to the tender mercies of the court below. The parties all belong to the colored population of our state, who, owing to their ignorance, as a general rule, should have justice administered to them tempered with much mercy.

Judgment reversed.

HENRY H. DAVIS *et al.*, plaintiffs in error, vs. BENJAMIN DAVIS, executor *de son tort*, defendant in error.

Complainants, as heirs-at-law, cannot maintain a bill against defendant, as an executor *de son tort*, for property conveyed to him by their ancestor during life, the deed being alleged to have been procured through fraud; *aliter*, if they were creditors, and there was no administration.

Administrators and executors. Debtor and creditor. Before Judge KIDDOO. Randolph Superior Court. May Term, 1875.

Reported in the decision.

H. & I. L. FIELDER, for plaintiffs in error.

B. S. WORRILL, for defendant.

WARNER, Chief Justice.

This was a bill filed by the complainants against the defendant as executor *de son tort* of Mary Davis, deceased, alleging that the said Mary died intestate, entitled to certain personal estate in money, of the value of \$1,600 00, which was in the hands of the defendant at the time of her death either as a loan or deposit; that no administration has been had on her estate, and that the defendant, without legal warrant or authority, has possession of said estate in money, and claims the same as his own right and property, and refuses to pay the same to complainants, who are the heirs and distributees of said Mary Davis, deceased, but has wrongfully appropriated and converted the same to his own use; wherefor the complainants pray that the defendant may account for said estate in his hands, and be decreed to pay the same to them.

On the trial of the case, the jury, under the charge of the court, found a verdict in favor of the complainants, for the sum of \$1,953 75. The defendant made a motion for a new trial on the several grounds therein set forth, which was granted by the court, and the complainants excepted.

It appears from the evidence in the record, that in June 1859, the deceased, Mary Davis, who was the mother of the defendant, executed and delivered to him a deed in consideration of natural love and affection, by which she gave unto him the money arising from a certain described judgment and two notes therein mentioned, which is the money now sued for, and that the defendant claimed the money as his own property under that deed. The complainants attacked that deed on the ground that it was fraudulently procured by the defendant from his mother. The evidence in relation to this point in the case was conflicting. Mary Davis, the mother of defendant and maker of the deed of gift, died in June, 1871, twelve years after the making thereof, and the main question in the case is, whether the defendant was liable

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to be sued for the money in his hands, by the complainants, as an executor *de son tort*. The 2441st section of the Code, declares that "If any person, without authority of law, wrongfully meddles with, or converts to his own use, the personality of a deceased individual, whose estate has no legal representative, he shall be held and deemed an executor in his own wrong, and as such shall be liable to the creditors and heirs, or legatees of such estate, for double the value of the property so possessed or converted by him; nor shall such executor be allowed to set-off any debt due to him by the deceased, or voluntarily paid by him out of the assets." It is quite apparent from the evidence in the record, that the defendant did not convert the money claimed by the complainants to his own use, after the death of Mary Davis. If he *wrongfully* converted it to his own use at all, that conversion took place, as against the rights of Mary Davis, twelve years before her death, and if the defendant acquired no title to the property, she could have sued for it in her lifetime, or her administrator would have been the proper person to have sued for it after her death for the benefit of her heirs, and creditors, if any.

If Mary Davis, the decedent, had conveyed the property to the defendant to defraud her creditors, they could have reached it in his hands during her life, and also might have reached it in his hands after her death, by suing him as executor *de son tort*, as was held in the case of *Clayton vs. Tucker*, 20 *Georgia Reports*, 464, provided there was no administration on her estate. But the complainants are not creditors seeking to set aside a fraudulent conveyance made by the deceased to the defendant for the purpose of defrauding them, but they are the heirs of the deceased, seeking to recover money from the defendant as an executor *de son tort*, which they allege he wrongfully converted to his own use as against the rights of the deceased, Mary Davis, through whom they claim, twelve years *before her death*. In other words, they allege that the defendant became indebted to Mary Davis \$1,600 00 for money which he wrongfully appropriated and

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converted to his own use twelve years before her death. In our judgment, the defendant was not liable to the complainants as an executor *de son tort* under the provisions of the 2441st section of the Code, on the statement of facts disclosed in the record.

Let the judgment of the court below be affirmed.

LEMUEL T. DOWNING *et al.*, plaintiffs in error, vs. JOHN PEABODY, administrator, defendant in error.

1. A private contract made with a guardian for the purchase of the ward's land for a stipulated price, at a future public sale, under a proper leave from the ordinary, is contrary to public policy: Code, sections 1828, 2566; 9 *Georgia Reports*, 114; 22 *Ibid.*, 637; 46 *Ibid.*, 34.
2. Money advanced to a guardian upon such a contract, in anticipation of a sale which he did not live to consummate, cannot, as against the ward, be treated as a payment to a succeeding guardian, on a legal public sale of the land made by the latter to the same persons who advanced the money, even though by agreement between the second guardian and the purchasers when the deed was made, the advance to the former guardian was considered equivalent to cash, and as present payment.
3. In the application of the foregoing principles, it makes no difference that the second guardian was surety on the guardianship bond of the first, and was also his business partner; that the money advanced came in to the partnership business so as to create a debt for it against the firm, which debt survived against the second guardian as surviving copartner, and that the firm assets came into his possession, and were in his possession, when, as guardian, he sold and conveyed the ward's land.
4. The ward having died, his administrator is entitled to maintain a bill in equity against the second guardian and the purchasers, to compel actual payment of the purchase money thus left unpaid, the purchasers still retaining the land and making no claim to rescind the contract of purchase.

Guardian and ward. Contracts. Before Judge UNDERWOOD. Muscogee Superior Court. May Term, 1875.

Upon the trial, the court charged the jury, amongst other things, as follows:

"That neither the case made by the complainant, nor that made by the defendants, raised the question whether the pri-

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vate agreement for a sale, made by King, was binding and valid against the guardian, McKendree."

"That a payment in advance to King, as guardian, upon a sale of property of the ward, to be afterwards made by King, as guardian, is not a payment to McKendree, as guardian, upon a sale made by McKendree, as guardian, afterwards, and after the death of King. That the purchasers at the sale made by McKendree, as guardian, if put in possession of the property under and from McKendree, as guardian, will be bound to respond for the unpaid purchase money except in so far as the guardian has properly paid money to and for the use of the ward."

To this charge the defendants excepted. The jury found for the complainant. Defendants assign error upon the above ground of exception.

For the remaining facts see the opinion.

H. L. BENNING ; L. T. DOWNING, for plaintiffs in error.

PEABODY & BRANNON, for defendant.

BLECKLEY, Judge.

King was the guardian of a minor who owned certain real estate. He agreed privately with Downing and Peterson for the sale of it, at a stipulated price, \$945 00. In order to make a legal title it was understood that leave was to be obtained from the ordinary, and the sale was to be advertised and made publicly, according to law. After obtaining leave from the ordinary, King advertised the sale, and while the advertisement was running, called upon Downing to advance \$800 00, of the agreed price. Downing made the advance, and King died before the property was brought to sale. McKendree then obtained letters of guardianship, advertised the property, and sold it legally. Downing and Patterson became the purchasers at the same price which had originally been agreed upon with King. When the deed was made by McKendree, they insisted that the advance of \$800 00 to King should be treated as a payment of that much of the

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purchase money, to which McKendree assented, executing the deed upon the payment to him of the balance, \$145 00 The ward died, and Peabody administered upon his estate; after which, as such administrator, he filed this bill against McKendree, Downing and Patterson, to recover the \$800 00 as unpaid purchase money.

1. The private contract with King was contrary to public policy. Although, according to the evidence, the price agreed upon was not only fair, but in excess of the value of the property, still, the rule of law was violated. See the cases cited in the syllabus.

2. Independently of the question of public policy, we think the advance to King cannot be treated as payment. The purchasers contend that the office of guardian is the same office though incumbents change, and that a successor in the trust is bound by the acts of his predecessor. This is doubtless true for many purposes; as, for instance, if the first guardian had completed the sale, making it in all respects legal, and had received a part of the purchase money, leaving the deed unexecuted and the balance of purchase money unpaid, the successor, upon receiving such balance, might be compelled to execute title, the same as if the sale had been his own and he had received all the purchase money. In such a transaction the guardianship-trust would have been properly represented, as to part of it, by one guardian, and, as to part, by another. But that is not the case before us. As to the money advanced to King, that did not become the ward's money; it did not pass under the protection of the guardian's bond; in spite of the illegal agreement concerning it, it was simply an advance to King as an individual; the ward's title to his property had not been divested; and the ward could not be owner of both the property and the money. The receipt of the money was not a representative act; it was not an act for which the law provides; it was not an act for which King, as guardian, was responsible; it was not an act, which, as against the ward, can be made available for any purpose in favor of those who participated in it.

3. McKendree was King's surety on the guardianship bond ; and was also his partner in business, under the firm name of McKendree & King. The \$800 00 advanced to King was brought, it seems, by him into the partnership business ; and, on his death, the firm assets remained in McKendree's possession as surviving partner. He, doubtless, had this possession when, as guardian, he sold and conveyed the ward's property. We do not think these facts make any difference. Giving them the fullest possible effect, they would amount simply to this, that the \$800 00 constituted a debt against McKendree as surviving copartner, and that he had assets of the firm, a part of which were the proceeds of this identical fund, or perhaps the fund itself. He could not use his ward's property to pay either a partnership debt or his own individual debt ; and there is no pretext that, as guardian, he purchased any portion of the partnership effects, or took any steps to substitute them in place of the ward's property, even if it would have been competent for him to do so.

4. The ward having died, his administrator is entitled to compel payment of the unpaid purchase money, and for that purpose this bill, we think, was proper. It alleges the insolvency of McKendree and that is admitted. But even if he were not insolvent, he has failed in his duty in not making a collection, and for that reason might very well be made jointly liable with the purchasers from whom he ought to have collected. It is more equitable that the defendants in this bill should respond to the administrator than that McKendree's surety should do so. The purchasers retain the land without having legally paid for it, in full ; and they make no claim to rescind the contract of purchase for fraud or any other reason. The decree rendered against the defendants was altogether as low as it could have been made. They were allowed credit, not only for all amounts that went to the ward's benefit from either guardian, but for a small excess on their bid over the real value of the property. The allowance of this excess was by consent, and was, we think, liberal and proper.

Judgment affirmed.

Crowder *vs.* The State of Georgia.

RACHEL CROWDER, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

Though confessions alone will not authorize a conviction, yet when the assistance furnished the prisoners to escape from jail were two augers, to one of which the defendant had peculiar access, and when the defendant frequently visited the jail to see her husband, who was one of the prisoners, and in whose cell the augers were used, and made repeated confessions to various persons of her guilt and her connection with the augers, and where she got them, such repeated confessions, in connection with her peculiar access to one of the augers and to the jail to visit her husband, will authorize her conviction; and this court will not control the discretion of the court below in refusing to grant a new trial.

Criminal law. Confessions. Before Judge KIDDOO. Terrell Superior Court. November Term, 1875.

Reported in the opinion.

A. HOOD; T. J. PICKETT, for plaintiff in error.

JAMES T. FLEWELLEN, solicitor general, by brief, for the state.

JACKSON, Judge.

Rachel Crowder was indicted for assisting her husband, a prisoner in jail, to escape. She confessed the crime to several witnesses, and was convicted. A motion was made for a new trial, but refused, and the case is before us on the single question, is there evidence enough to sustain the verdict? She cooked for a gentleman to whom one of the augers furnished the prisoner belonged, and had access to it where he kept it hanging in the dining room. She visited the jail very often to see her husband, and had every opportunity to convey the two augers used to the jail. The augers were used in her husband's cell. We have no doubt of her guilt, and think the confessions sufficiently corroborated by these circumstances to sustain the legality of the finding.

Judgment affirmed.

Wilkin vs. Boykin.

PETER C. WILKIN, plaintiff in error, vs. GILFORD BOYKIN,
defendant in error.

Although an action be brought in the statutory form for personalty which is alleged to be in possession of the defendant, yet, if the proof show a conversion by such defendant prior to the commencement of suit, a non-suit should not be ordered.

Trover. Pleadings. Before Judge KIDDOO. Miller Superior Court. October Term, 1875.

Reported in the decision.

I. A. BUSH, by JACKSON & LUMPKIN, for plaintiff in error.

A. HOOD; HOYLE & SIMMONS, for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiff against the defendant in the statutory form, to recover the possession of a bale of cotton of the alleged value of \$60 00. The defendant filed a plea of the general issue of not guilty, and that the defendant was not in possession of said bale of cotton at the time of the commencement of the plaintiff's action. It appears from the evidence in the record that, in the fall of 1874 the defendant sued out a possessory warrant against the plaintiff for the bale of cotton in dispute, and on the trial thereof before the justice, the possession of the cotton was awarded to the defendant in this suit, on his giving bond and security for its forthcoming, as provided by the statute in such cases. The plaintiff proved at the trial that he bought the bale of cotton from Holt in the fall of 1874, and paid therefor \$41 75, and that it was worth that amount; that he bought it in his usual trade as a cotton buyer. Holt testified that he sold the bale of cotton to the plaintiff, and that it was the joint property of himself and defendant; that it was sold by him, by the direction of defendant, who said that there were so many *fi. fas.* against him that he was afraid to sell it,

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as it might be levied on. It was also proven that after the defendant got possession of the bale of cotton under the possessory warrant, that he said he was going to let Cothran have it, and rolled it over to Cothran's store, and it afterwards disappeared. The plaintiff here closed his evidence, and the defendant made a motion for a non-suit on the ground that the plaintiff had not shown that the defendant was in possession of the bale of cotton sued for at the time of the commencement of the plaintiff's action, which motion the court sustained and non-suited the plaintiff's case, whereupon the plaintiff excepted.

This form of action, as prescribed by the 3390th section of the Code, for the recovery of personal property, was intended to simplify the pleadings in that class of cases, and to allow such evidence to be introduced under it as would have entitled the plaintiff to recover in an action of trover, inasmuch as the verdicts and judgments in the suits brought under that form may be the same as in actions of trover. It would have been competent, therefore, for the plaintiff to prove that the defendant had possession of the cotton before the commencement of the action and had converted the same to his own use. the more especially as in this case the cotton was turned over to the possession of the defendant under the possessory warrant, to abide the result of such suit as the plaintiff might institute therefor. The evidence shows that the defendant had possession of the cotton, and had converted it before the commencement of the action, and the plaintiff was entitled to recover the proven value thereof, although the defendant may not have had the actual possession of it at the time of the commencement of the action. In our judgment, the court erred in non-suiting the plaintiff's case on the statement of facts disclosed in the record.

Let the judgment of the court below be reversed.

ROBERT WAGNER, guardian, plaintiff in error, vs. DAVID P. ROBINSON, defendant in error.

1. In a suit to charge a wife's estate for services, where, at the trial, the husband is dead and the wife insane, the plaintiff is an incompetent witness to prove that the services were rendered with their knowledge, consent and approbation, or to prove a contract with the husband in respect to the services.
2. A charge not applicable to the facts, in view of the main issue, should not be given.
3. Nor should a charge be given without, at least, *prima facie* evidence on which to base it.
4. The law of trusts and trust estates ought not to be given to the jury unless there is some evidence of a trust; but if given, whether correctly or not, a new trial will not be granted if the verdict is clearly right.
5. A married woman's property is not liable for the wages of an overseer hired by her husband to superintend her plantations, where there is no evidence that the credit was not given to the husband personally, or that he was not farming the plantations on his own account, or that he acted as his wife's trustee, or that she received the crops, or was otherwise benefited by the services rendered.

Witness. Charge of court. Trusts. Husband and wife.
Before Judge PATE. Laurens Superior Court. October Term,
1874.

Reported in the opinion.

HOWELL & DENMARK, by Z. D. HARRISON, for plaintiff
in error.

No appearance for defendant.

BLECKLEY, Judge.

An overseer sued for wages. The action was brought first against Vigal, as for a debt owing by him, individually. The declaration was afterwards amended, so as to make him defendant as trustee for his wife; and the effort of the plaintiff, on the trial, was to establish a contract with him as trustee, and recover against the trust estate. Pending the suit, Vigal died; and his wife being a lunatic, Wayne, as her guardian, was made a party in his stead.

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It appeared in evidence that the plaintiff was hired by Vigal and served as overseer on plantations belonging to Mrs. Vigal. Whether the property was held in trust, and if so, whether Vigal or some other person was trustee, was not shown. It did not appear that Mrs. Vigal had anything to do with the plaintiff, or his services, or that she received the crops made on her plantations, or took the benefit of the plaintiff's services in any manner whatever. There was no evidence that either the plaintiff or Vigal acted for the benefit of her or her estate. All that connected her with the matter, was that she was owner of the plantations and the wife of Vigal.

1. The plaintiff proved by several witnesses the value of his services, and that Vigal said they were satisfactory. He offered himself as a witness to prove the contract with Vigal; and upon being rejected by the court on the ground that Vigal was dead and Mrs. Vigal insane, he again offered himself to prove the value of his services, and that they were rendered with the knowledge, consent and approbation of both Vigal and Mrs. Vigal. He was again rejected for the same reason. It is possible that he was competent to testify as to the value of his services; but if so, it was a harmless error to rule out that part of his proposed evidence. The value was already proven by several other witnesses introduced by himself, and there was no evidence from the other side in reply. The point of value was not where the case pressed. If the plaintiff could have recovered at all, he would have recovered enough. Under the Code he was certainly incompetent to prove a contract with Vigal, who was dead. We think he was equally incompetent to prove knowledge, consent and approbation on the part of Vigal and wife in respect to the services rendered. They could not be heard in answer to him on these matters any more than on the express contract, one being dead and the other insane. Knowledge, consent and approbation could be material only as elements of implied contract. Proof of what was said and done by way of express agreement, might as well be admitted, as proof of mental

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states which the witness could not have known, except by inferring them from what was said and done, or from other less decisive indications.

2. The plaintiff requested the court to charge the jury that when services are performed at another's instance, without an agreement as to price, the law implies that they are to be paid for at what they are reasonably worth. Ordinarily, this charge would have been proper, but in the present case it needed amendment in one important particular. Paid for by whom? It is not stated, and there lay the whole controversy. The guardian of Mrs. Vigal defended this suit on the one ground that his ward's property was not liable for the plaintiff's wages. This was the plea and the sole defense. Had the request to charge stated that the law implies the services are to be paid for *by the employer* at what they are reasonably worth, it would have been unobjectionable. But without that amplification it lacked adjustment to the exigencies of the case, and the refusal to give it to the jury was not error.

3. Another request to charge was made and refused, and we think properly refused, for the reason, at least, that there was no evidence on which to base it. It was, that if the plaintiff performed services as overseer for the benefit of Mrs. Vigal, he was, in equity, entitled to payment out of her estate, and if the case was made out, recovery might be had at law. There is no evidence in the record that the services were for Mrs. Vigal's benefit.

4. The court charged that if Mrs. Vigal owned a trust estate, and Vigal was her trustee, and he, as such, contracted with the plaintiff to oversee the trust estate, and the ordinary did not approve the contract, the plaintiff was not entitled to recover. The court should not have made any such charge as this, there being absolutely no evidence that Mrs. Vigal owned any trust estate, or that Vigal was her trustee, or acted in that capacity in employing the plaintiff. The charge being thus erroneous for irrelevancy, it is of no consequence whether what it lays down in reference to the ordinary's approval be law or not. It may be that the act of 1866, Code,

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section 2331, is to be construed as requiring such approval, in order to charge trust estates, in all cases of contract by trustees for labor or service. We do not find it necessary to decide the question now, and it is one of too much difficulty and importance to decide needlessly.

5. The verdict below was for the defendant, and the judge granted a new trial for supposed error in refusing to charge as requested and in the charge given. While there was error in the charge given, it was not error, as we have seen, against the plaintiff. The evidence made no case whatever against Mrs. Vigal or her property. The verdict of the jury was right. The plaintiff hired himself to Vigal, and he must look to Vigal or his estate for compensation. To him, doubtless, the credit was given; for the plaintiff, at first, brought suit against him individually, and it seems to have been an after-thought to attempt charging him as trustee. When a husband farms upon his wife's land, it does not follow that he is her trustee or her agent, or that he is conducting farming operations for her. These facts, if true, are to be proved and not guessed at. The ownership of land is one thing, and farming or planting another. What the husband does, is to be presumed to be done for himself and on his own account, whether he uses his wife's land or that of some other owner. If it were otherwise in this case, it would most probably have been susceptible of proof by competent evidence. The jury could not consistently, with the facts before them, have found any other verdict than the one they did find, under any legal charge that the court could have given. For that reason, we reverse the judgment granting a new trial, and leave the verdict to stand.

Judgment reversed.

CHARLES A. SINDALL *et al.*, plaintiffs in error, vs. H. C. THACKER & COMPANY *et al.*, defendants in error.

(BLECKLEY, Judge, having been of counsel in this case, did not preside.)

1. The return of service by the United States marshal should be treated as conclusive of such service by the state courts. Our own sheriff's returns are so treated in courts other than where they are rendered, and in the courts where rendered, they can be traversed only by making the sheriff a party.
2. Whilst the residence of the family is the legal venue of the husband and father, it is the residence he, as the head of the family, selects; nor can his wife, in his absence and without his assent, change that residence so as to change his venue.
3. Service at the house where he left his family, especially when that family are still in the same city, and where, though the wife has sold the house and furniture, she has not delivered all the latter and parted with possession of the house, is good service, and particularly if a member of the family was still at the house and received and handed it to the defendant's attorney.
4. Appearance of the defendant and plea to the merits will cure all irregularities, if there be any, in the service, and whilst a defendant cannot give jurisdiction to a court which has none so as to bind third persons, such as other creditors of his, yet when the legal residence of the defendant, at the time of service, is in the jurisdiction, and he has been served, though it may be irregularly, his appearance and plea in such a case will operate to cure the irregularity in respect to everybody.
5. A charge of the court that a judgment attacked for fraud and collusion may be good in part, though fraudulently procured as a whole, does not hurt the party against whom it is made, if the jury, on a fair presentation of the issue of fraud or no fraud, find none at all, and sustain the whole judgment.
6. Questions of amendments and irregularities in connection therewith, in the district court of the United States, are matters of practice in that court, and will not be inquired into by the state courts. The final judgment of the court of the United States concludes them all so far as the state courts are called upon to consider and pass upon such federal judgment.

United States Courts. Service. Sheriff. Venue. Domicil.
Waiver. Jurisdiction. Judgments. Before Judge HALL.
Spalding Superior Court. February Term, 1875.

Reported in the opinion.

SPEER & STEWART, for plaintiffs in error.

Sindall *et al.* vs. Thacker *et al.*

LANIER & ANDERSON; E. W. BECK, for defendants.

JACKSON, Judge.

1. Thacker & Company moved a rule against the sheriff to show cause why certain funds raised from the sale of Sindall's property should not be paid to them. Certain creditors holding junior liens attacked the judgment of Thacker & Company, on the ground that Sindall was not served, and the United States district court for the northern district, therefore, had no jurisdiction, and on the further ground that the judgment was fraudulently obtained in that court; and again, because that court allowed an amendment of the declaration of Thacker & Company, which was never served. The United States marshal returned that he had served the defendant by leaving a copy at his most notorious place of abode, in Griffin, Georgia, which is within the northern district of Georgia. At common law this return would be conclusive, and could not be attacked at all. The statute of our state allows the return of the sheriff to be traversed, but that must be done in the court which rendered the judgment, and the sheriff must be made a party to the traverse: See *Maund vs. Keating*, page 396, and *Lamb vs. Dozier*, this term. We should certainly apply to the court of the United States either the common law rule or our own. If the former, the return of the marshal is conclusive; if our own law be applied, the return cannot be attacked except in the court which rendered the judgment, and the marshal should be made a party. This would seem to conclude the attack upon this judgment for want of service.

2, 3. But conceding that it could be attacked in the superior court of Spalding county, what are the facts and what the charge complained of. The facts are that Sindall left his family in Griffin at a house there; that at the time of service by the marshal his wife had just left it; the house and furniture was sold by her, but some of the furniture not delivered, remaining in the house, and his brother, who was in the house or returning

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to it, got the service. Sindall appeared and pleaded to the case. The court charged substantially that if Sindall left his family in this house and they quit it, and some member was in it and got the paper, it was sufficient service. We think so, too. The residence of the family is the venue of the head of it, but it is the residence which he selects. They cannot change it without his assent. Where he leaves them is their home, until he chooses another for them, and there is no evidence that he had done this. They were still in Griffin; had gone to a boarding-house. Mrs. Sindall had sold the furniture but had not delivered it all, and had sold the house, but the dominion was still hers, in respect to possession, even if she could have sold it and the furniture in the absence of her husband.

4. But the appearance and plea and then withdrawal of it, cures the service even if defective.

5. In respect to the fraud used in procuring the judgment, the only error complained of is that the court charged that if any part of the judgment was for a valid debt, that part would stand. But the jury found that all of it was right and the evidence certainly sustains the verdict. It was conflicting, but there is enough to sustain it. Hence the charge did no harm to defendant.

6. In respect to any irregularities in allowing amendments or other proceedings of like character in the United States district court, we cannot see what right the circuit court of Georgia has to interfere therewith. On the whole, we think the court below right in refusing the grant of a new trial and we affirm the judgment.

Judgment affirmed.

JAMES M. SIMMONS, plaintiff in error, vs. **WILLIAM W. ANDERSON**, defendant in error.

A waiver by a mortgagor, for himself and family, of all right to a homestead in the property mortgaged, is binding, though such right be conferred by the constitution.

Simmons vs. Anderson.

Constitutional law. Homestead. Waiver. Before Judge WRIGHT. Monroe Superior Court. September Term, 1875.

Reported in the decision.

HAMMOND & BERNER, for plaintiff in error.

J. S. PINCKARD, for defendant.

WARNER, Chief Justice.

This was a claim case which was submitted to the decision of the court without the intervention of a jury, on the following agreed statement of facts: "That the defendant in *fi. fa.*, James M. Simmons, on the 27th day of March, 1873, executed to the plaintiff, W. W. Anderson, a mortgage upon one hundred acres of land; that said instrument was signed, sealed and delivered with all the solemnity necessary under the law, and is in all respects a valid mortgage; that in said instrument the said Simmons waived for himself and family all right to a homestead to or out of said bargained and described premises; that said mortgage has been foreclosed, and *fi. fa.* issued against the defendant and levied on said land; that the defendant, as the head of a family, has, since said foreclosure, issuing and levy of said *fi. fa.*, applied for and obtained a homestead on said land according to the requirements of the law, and has, as agent for his wife, filed his claim thereto." Upon this statement of facts the court decided that the land was subject to the mortgage *fi. fa.* levied thereon; whereupon the claimant excepted.

The only question made here on the foregoing statement of facts, was whether Simmons, the defendant in the mortgage *fi. fa.*, could waive his right, as the head of a family, to claim a homestead in the *property* described in the mortgage, so as to prevent him from afterwards obtaining a homestead on the specific property mortgaged, and claiming the same as a homestead exemption, as the agent of his wife, from being subject to that mortgage *fi. fa.* The 1753d section of the Code de-

declares, that "in this state the husband is the head of the family, and the wife is subject to him; her legal civil existence is merged in the husband, except so far as the law recognizes her separately, either for her own protection, or for her benefit, or for the preservation of public order." The constitution of 1868 declares that each head of a family, or guardian or trustee of a family of minor children, shall be entitled to a homestead of realty to the value of \$2,000 00 in specie, which, when set apart, is exempt from levy and sale, except for taxes, money borrowed and expended in the improvement of the homestead, or for the purchase money of the same, and for labor done thereon or material furnished therefor, or removal of encumbrances thereon. When the constitution declares that each head of a family shall be *entitled* to a homestead in realty to the value of \$2,000 00 in specie it was not intended that it should be *compulsory* on each head of a family to take a homestead in his land whether he desired to do so or not. The obvious and fair construction of this clause of the constitution is, that each head of a family should be *entitled* to a homestead as therein provided, if he desired to have one, and not otherwise. When Mr. Simmons borrowed the money and executed his mortgage deed to secure its payment, he stipulated, under his hand and seal, that he waived for himself and family all right to a homestead in the mortgaged premises; in other words, he declared that, as the head of a family, he did not desire to have a homestead on that land so mortgaged. As the head of his family, and owner of the land, he could have made an absolute sale of it, and thus have defeated all claims of his family to a homestead on the land. Why, as the head of his family, and owner of the land, could he not stipulate that he would not claim a homestead on it, the more especially if he did not desire to have one? Besides, it does not appear from the record in this case but that the defendant, Simmons, had plenty of other land than that mortgaged on which he could have taken a homestead exemption as the head of a family. The obtaining and claiming a homestead exemption in the mortgaged prop-

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erty by Mr. Simmons, as the agent of his wife, after stipulating in the mortgage, as the head of his family, that he *waive* for himself and family all right to a homestead in the mortgaged premises, does not, we regret to say, exhibit a very high standard of either his legal or moral obligation to pay an honest debt. In view of the facts as disclosed in the record, we affirm the judgment of the court below.

Judgment affirmed.

BENJAMIN L. HOLLAND *et al.*, administrators, plaintiffs in error, vs. JOHN G. TYUS *et al.*, defendants in error.

Where, during the late war, a creditor requested his debtor, whose note he held, to send Confederate money to Flanders, or some other good house in Macon, to pay the note, and the debtor replied he would send it to Fears at Macon, and about a month thereafter, sent it to Fears, writing to the creditor that he had sent it, but this letter did not reach the creditor, and the latter had no knowledge that the money had been sent, until after the war, when it had become worthless, the transaction was not a payment; and these facts would not bar a recovery on the note. The debtor having waited a month after giving notice that he would send the money to Fears, was bound, when he did send it, to see that information thereof reached the creditor.

Debtor and creditor. Payment. Before Judge WRIGHT.
Mitchell Superior Court. May Term, 1875.

Reported in the opinion.

VASON & DAVIS, for plaintiffs in error.

STROZER & SMITH, for defendants.

BLECKLEY, Judge.

This was complaint on a promissory note, dated January 1st, 1861, and due twelve months thereafter. The suit was brought in 1866. There is no plea in the record, but the defense sought to be established by the defendants was pay-

ment. They were sworn in their own behalf. One of them (Tyus) testified that in 1863 the plaintiff told him to send Confederate money in payment of the note, by express, to one Flanders at Macon, and afterwards wrote to him to send it to Flanders or some other good house in Macon; that he wrote to plaintiff he would send it to Fears; and that about one month thereafter he gave the money to his co-defendant to be sent to Fears at Macon, after which he wrote to plaintiff that he had sent it; that whether the plaintiff ever received the money or the notice that it was sent, he did not know; neither did he know whether the money ever reached Fears, or, of his own knowledge, whether it was sent forward by his co-defendant or not. The latter testified that he did send it to Fears at Macon, by express, in December, 1863, and that Fears told him he had received it. Whether it, or notice that it was sent, ever reached plaintiff, he did not know. When the witness went into bankruptcy, he returned this note as one of the debts he owed.

The plaintiff testified that the note was given for the price of a slave, and was intended by the parties to be paid in good money; that he wrote to Tyus several times for the money to be sent to him; Tyus wrote requesting an interview in Macon, and afterwards wrote that he would send the money to Macon to Fears; but if he ever sent it, witness never knew it nor received any notice of it; no money was ever offered him; if it had been he would have accepted it, though he did not recollect any particular agreement to receive Confederate money. If such money had been sent to Macon and he had known it he would have gone after it.

No correspondence between the parties was produced. The letter of plaintiff, referred to in the testimony of Tyus, was lost. The other letters mentioned are unaccounted for, but no objection was taken to the recital of their contents. The jury having found for defendants, a motion was made for a new trial, which motion was overruled.

Taking the evidence in the most favorable light for the defendants we do not think a payment was established. Tyus

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wrote that he would send the money to Fears, and the plaintiff received that letter; but it does not appear that the plaintiff was advised *when* the money would be sent. Was he look out for it during a week, or a month, or for what length of time? Why did Tyus wait about a month before taking any measures to send it? If he had sent it promptly the prior notice to the plaintiff might have sufficed; but as he delayed for a month he was bound to give fresh notice, and to see, at his peril, that the notice reached the plaintiff. He testifies that he wrote to the plaintiff that the money had been sent, but does not say to what point the letter was addressed or by what conveyance it was sent. Indeed he does not say that it was sent at all, except as a sending of some sort may be implied in the expression that he wrote. But if he sent it, it never reached the plaintiff, and the plaintiff did not receive notice otherwise, and never got the money. Then the note remained in the plaintiff's hands, and, so far as appears, was never called for. It was returned after the war by one of the defendants, in a schedule of his outstanding debts, and the defendant that so returned it is the one by whose testimony the actual sending of the money to Fears is established. To treat so grave a matter as payment of a just debt as arising out of the loose, vague and careless transaction detailed in the testimony, would be to deny that security to the right of a creditor which it is the province of law to afford and courts to enforce. It may be that if all the correspondence between the parties was produced, or the contents minutely proved, the case would present a different aspect; but acting only on what is before us, we must pronounce the verdict warranted by the evidence, and order a new trial.

Judgment reversed.

Sloan vs. Briant.

ELIZABETH M. SLOAN, plaintiff in error, vs. GEORGE J. BRIANT, defendant in error.

An action brought by a woman against a married man to recover money under a contract made before cohabitation to pay her \$1,000 00, and give her a house and lot in case of the birth of a child, though repeated and ratified often after the birth of the child, is a suit instituted in consequence of adultery, and in such a suit the woman is incompetent to testify: Code, section 3855.

Witness. Contracts. Before Judge McCUTCHEN. Bar-tow Superior Court. July Term, 1875.

Reported in the opinion.

M. R. STANSELL, for plaintiff in error.

WOFFORD & MILNER; D. A. WALKER; A. JOHNSON, for defendant.

JACKSON, Judge.

Mrs. Sloan, a widow, sued Mr. Briant, a married man, for the breach of a contract to pay her \$1,000 00 and give her a house and lot. The contract, she alleges in her original declaration, was made before she yielded to his importunities and became the victim of his arts and allowed him to prostitute her person. He promised, in the event she would yield and a child should be born, to care for her and the child, and contracted to pay the money and to make over the property. Afterwards she amended this declaration, and set out the promise more clearly and specifically, and alleged that it was repeatedly made and ratified after the birth of the child. These allegations she proposed to prove by her own testimony. It was objected that she was an incompetent witness, the court sustained the objection, and counsel announcing that he had no further testimony to offer, the court non-suited her and dismissed the action, so that the single question is, was this woman a competent witness to prove her case? Before the act of 1866, (Code, section 3854,) there can be no doubt

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that she would not have been a competent witness. She is a party, and that would have excluded her evidence. The question is, then, does the act of 1866 render her competent in this case? The answer to this question turns on the construction of one of the exceptions: Code, section 3855. That section enacts as follows: "Nothing contained in the preceding section shall apply to any action, suit or proceeding, or bill, in any court of law or equity, instituted in consequence of adultery, or to any action for breach of promise of marriage." Is this an action, suit, or proceeding instituted *in consequence of adultery*? The exception is as broad as language can make it. *Any* action, or suit, or proceeding, or bill, in *any* court, are the terms. *Any*, as if to embrace every possible case; *any*, to apply to every court. Well, if it had not been for adultery, this child had not been born; had not this child been born, this promise would not have been made after its birth, nor, if made before, would have been operative. Adultery is the cause, this contract its sequence. Whether it be the immediate or the remote cause is immaterial, if the suit be the consequence of adultery as the cause. The words, "*in consequence*," apply as well to the initiatory as to the proximate, cause of this suit.

In *Cook vs. Cook*, 46 *Georgia Reports*, 308, it was held that the husband was incompetent to prove the adultery of the wife in a divorce case, under this clause or section of the Code. The action of divorce was no more brought or instituted in consequence of adultery, than the case at bar was instituted for the same cause. Adultery was the cause, the suit the consequence, in each case. Nor will it do to say that, though she might be incompetent to prove the cohabitation, the adultery, she is competent to prove the contract. She was excluded altogether before the act of 1866; that act lets in certain parties to suits to testify, but still applies the old law of exclusion on account of being a party to her. "*Nothing* contained in the preceding section" shall apply to any action instituted in consequence of adultery, is the emphatic language of the Code, section 3855. Nothing in the act of 1866,

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therefore, shall apply to give competency to this party to swear. Well, she had no competency to testify at all in this case before the act of 1866; *nothing* in that act gave her the competency to swear in this case at all; if she did not have it before, and did not get it then by the act of 1866, it must follow that she cannot testify in this case as a witness at all. She was incompetent to swear to any single fact in the case before the act of 1866; the exception makes that act inapplicable to her, therefore she is still incompetent to swear to any fact in the cause.

Judgment affirmed.

JAMES HABERSHAM, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

1. It is error to charge the jury that they are in no sense judges of the law.
2. On the trial of a prosecution for aiding to escape from custody, the fact of custody is for the jury, and so also is the legality of that particular custody. The court should acquaint the jury with the needful rules of law to enable them to distinguish legal from illegal custody, and let them make the application thereof to the facts in evidence.
3. It is error to charge that the custody was legal if the state's evidence is true, or that if the jury believe the evidence for the state they must find a verdict of guilty.
4. Custody by a private person after a legal arrest without warrant, becomes illegal if protracted for an unreasonable time, and whether the time was reasonable or unreasonable is a question for the jury, under proper instructions from the court as to the promptness which the law exacts in conveying the party arrested before a magistrate.
5. Cruel treatment of his prisoner by the captor may be considered (where there is evidence on the point) to illustrate the purpose of the arrest and the *bona fides* of the custody.
6. Custody voluntarily assumed by a private person without warrant, may be lawfully terminated with his consent, by turning the prisoner loose, especially if the latter be not guilty.
7. To make the violation of a lawful custody criminal, its legal character need not be positively known to the offender, if he has good reason to believe it, or is grossly negligent in the use of means to inform himself.
8. Actual guilt of the person held in custody for felony by a private person without warrant, is not indispensable to the legality of the custody, and

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therefore neither his conviction nor his prosecution is a pre-requisite to convicting another for assisting him to escape. The question of his guilt is not otherwise involved than as throwing light upon the motive and lawfulness of his arrest, but for that purpose it is open to the consideration of the jury.

Criminal law. Escape. Arrest. Charge of Court. Warrant. Evidence. Before Judge TOMPKINS. Chatham Superior Court. May Term, 1875.

Hambersham was indicted for the offense of assisting a prisoner (name unknown to the jurors,) to escape from the custody of Lawrence Banks and Chatham Rodgers. The defendant pleaded not guilty. The evidence made, in substance, the following case :

On the night of June 13th, 1875, at about one o'clock, two clerks, Banks and Rodgers by name, arrested a boy in the house which connected with the store in which they were employed. They state that this boy, with some other person who ran off, broke into the house with the view of passing thence into the store ; that they only struck him for the purpose of overcoming his resistance when it was sought to arrest him ; that the boy had a sack over his head with holes for his eyes cut in it.

After his arrest he was tied, and according to the evidence of the defendant, whipped twice. Rodgers set up with him all night. In the morning Banks went to tell the proprietor of the store what had occurred. During his absence, according to the testimony of the state, at about eight o'clock, defendant untied the boy and took him away from Rodgers. Defendant said he would take upon himself the responsibility of releasing him. Rodgers said the boy had broken into the house. Defendant replied that he was a constable and knew the rules of law. Rodgers did not resist defendant as he was afraid of him. There had been a storm on the previous evening at about nine o'clock.

The boy, whose name was subsequently discovered to be Solomon Weaver, testified that he went through open doors into the house for the purpose of avoiding a storm ; that he

went into a closet and went to sleep; that he entered before the shop was closed; that when discovered he was shot at, arrested and whipped; that when defendant came in the morning, he gave him this account of the transaction; that Rodgers then told the defendant to turn him loose, which defendant did; that he immediately gave himself up knowing he had done nothing wrong. •

Defendant stated that on the night of June 13th, he was up very late, and in passing the house which had been broken into he heard some one crying; that he peeped into the house and saw a boy tied; that he got up at twenty-five minutes after nine o'clock, A. M., and saw a crowd in front of the store; that he went down there and saw this boy who gave him his account of the trouble he was in, saying that Rodgers had whipped him for coming in and sheltering himself from the storm; that he turned him loose, telling Rodgers that he had no right to whip him; that he turned the boy loose by consent of Rodgers, who said he did not wish to have the boy dealt with by law, but would give him a few stripes.

The jury found the defendant guilty. A motion was made for a new trial upon the following grounds, to-wit:

1st. Because the court erred in charging the jury that they could find the defendant guilty notwithstanding the person claimed to have escaped had never been prosecuted.

2d. Because the court erred in charging that the jury were, in no sense, judges of the law, but must receive the law as given from the court, as law.

3d. Because the court erred in charging that they were not judges of the fact as to whether the custody of the escaped person was legal or not under the circumstances.

4th. Because the court erred in charging that the custody was legal if the evidence adduced for the state was true.

5th. Because the court erred in charging that it was the exclusive judge of the question as to whether the custody was legal or not in this case, under the circumstances and facts disclosed.

6th. Because the court refused to charge that if the jury

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believed from the evidence that the holding of the boy was for an unreasonable time after his arrest, then the custody was not legal, and they must acquit.

7th. Because the court erred in charging that the jury could not consider the fact that the boy was being cruelly treated at the time he was released.

8th. Because the court erred in refusing to charge that if the jury believed that Rodgers, who had the boy in custody, told the defendant to turn him loose, then they could not find the defendant guilty.

9th. Because the court erred in refusing to charge that the jury could not find the defendant guilty unless they believed from the evidence that he knew the boy was held for a criminal offense.

10th. Because the court erred in charging the jury, that in making up their verdict they could not consider the question whether the boy had or had not been guilty of a criminal offense; but that if the boy was in custody of Rodgers, as the evidence for the state disclosed, although he may have been perfectly innocent of any burglary, still, if the jury believed the evidence for the state, they must find the defendant guilty.

The motion was overruled and the defendant excepted.

J. V. RYALS, by brief, for plaintiff in error.

A. R. LAMAR, solicitor general, by W. G. CHARLTON, for the state.


BLECKLEY, Judge.

1. Logically considered, the trial of a criminal case is an effort to complete a final syllogism, having, for one premise, matter of law; for the other, matter of fact; and for the conclusion, the resulting proposition of guilty or not guilty. It is the duty of the judge to supply the jury with material for the major premise of this syllogism; and it is the duty of the jury to collect from the evidence the minor premise, compare the two, draw the conclusion, and declare it in their verdict.

Inasmuch as it is possible for the judge to mistake the law or misrepresent it, the material which he supplies, or some part of it, may be erroneous. Are the jury, nevertheless, to accept it as correct, or is it subject to their revision and correction? May they, if they think it faulty, reject it, and substitute in its place something corresponding to their own convictions of what the law really is? Are the scriptures of the law an open bible; or must they be read for the laity by the priesthood of the bench? The power of overruling the judge's charge, apparently conceded to the jury by this court in most of the cases (see Hopkins' Annotated Penal Laws, section 1602,) prior to Brown's case, reported in 40 *Georgia Reports*, 689, is, in the latter, denied; and, by several later adjudications, the doctrine of Brown's case has become the established rule of decision: 'See 41 *Georgia Reports*, 217; 49 *Ibid.*, 485; 52 *Ibid.*, 82, 290, 607. It is, perhaps, too late for a single member of the court to urge his individual conviction that Brown's case was an innovation. The learned judge who delivered the opinion of the court in that and in some of the subsequent cases cited above, has declared that it was not an innovation, that it was opposed to previous *dicta* only, not to previous decisions. He thought the true principle of the former cases was preserved. Acquiescence in that view would, probably, at this late day, be the better line of judicial conduct for any of his successors who might be of a different opinion. The now current holding is, in effect, that, to the jury, the highest and best evidence of what the law is, is the charge of the court; indeed, that their only final access to the law is through this charge. And it is maintained that, in order to judge of the law, it is in nowise necessary that the jury should be invested with power to revise the charge and correct it. As the judge is the organ of the law itself, through whom is made known to the jury what the law is, they are to receive it as he lays it down, and not discredit him as a legal authority. In judging the law they are to pass upon what it is in the charge, not upon what it is out of the charge; and coming thus to an understanding of it, are to

determine what is its right and proper application to the facts in evidence, and what conclusion results from combining the two elements of law and fact. When the jury hear the charge, understand what it means, and apply it to the facts before them, they have judged of the law which the charge contains; and, as they have no proper access to any different law, there is, for them, no different law on the subject, and they cannot correct the errors of the judge if they would. Relatively to the jury, the charge stands like a volume of law published by authority—the only volume so published of which they know the contents. But none of the cases hold, or even hint, that the jury are in no sense judges of the law. If to judge the law and to follow the charge be incompatible, that is, if to accept the law as registered in the charge be a surrender of the right to judge of it, then the theory that the charge is binding must be abandoned, for the statute expressly declares that the jury shall be judges of the law as well as the fact: Code, section 4646. If we must give up one or the other of the two things, it is in vain to hesitate; the right to judge must be preserved, and the duty of conforming to the charge be no longer exacted. We have seen, however, that the two branches of the rule are believed to be reconcilable, that is, that the jury may be judges of the law without having the right to contradict the court or to reject what is delivered as law from the bench. No tribunal whatever is at liberty to refuse to recognize as law what comes to it duly vouched as such by the highest instrumentality appointed by the law to give it assurance. If otherwise, a court, in judging of the law contained in the constitution of the United States, might deny the contents to be law, instead of merely finding out the true meaning of the instrument and applying that meaning to the case in hand.

2. In the foregoing presentation of the relative functions of judge and jury, the subject has been contemplated in its widest range, as embracing an entire case; but the like principle of separation between the province of the judge and that of the jury is to be observed in dealing with any given sub-



division of the case. Thus, an essential part of the offense before us is the custody alleged to have been violated. Was it a legal or an illegal custody? How are the two classes to be distinguished? By certain variations in the attendant circumstances. What circumstances will bring this particular custody within the class legal, and what will bring it within the class illegal, are questions of law; but the actual presence or absence of one set of circumstances or the other, in the particular instance, is matter of fact. Legal custody or illegal custody is, therefore, a conclusion consisting of law and fact blended; just as guilty or not guilty is a conclusion composed of the like elements. As both conclusions are of the same nature, the processes of arriving at them are similar. The law element is the material for the major premise in a special syllogism touching custody, and is to be supplied by the judge. The jury are to collect from the evidence the minor premise, compare the two, and draw the conclusion of legal custody or illegal custody. As the judge can decide no question of fact, he is not permitted to declare whether the particular custody disclosed by the evidence belongs to the one class or to the other. He, as the organ of law, can carry his voice no farther than the law goes. He can say, as the law does, that such and such custody is legal, and such and such illegal; but he cannot say that this particular custody was such or such, for that depends, not on the law, but on the evidence. Of course, too, the bare fact of whether there was any custody at all, is, also, for the jury, unless it is admitted.

3-8. The remaining points are distinctly ruled in the head-notes, and will be fully understood when read in the light of the reporter's statement.

Judgment reversed.

The Savannah, etc., Company *vs.* Grant, Alexander & Company.

THE SAVANNAH, GRIFFIN AND NORTH ALABAMA RAILROAD COMPANY, plaintiff in error, *vs.* **GRANT, ALEXANDER & COMPANY**, defendants in error.

(JACKSON, Judge, being related to the parties, and also having been of counsel, did not preside.)

1. As the action was not brought by the plaintiffs, as mechanics, but as partners and contractors, they were not entitled to recover a lien as mechanics. An amendment will cure this omission.
2. If the plaintiffs were mechanics, and contracted to do the work in the capacity of mechanics, they would be entitled to their lien. *Aliter*, if they were to do the work in the capacity of contractors. This question the jury must decide.
3. Whilst the construction of a written contract is for the court, still it is beyond its province to determine whether work done thereunder constituted parties thereto mechanics.

Pleadings. Mechanic's lien. Amendment. Contracts. Charge of Court. Before Judge TOMPKINS. Spalding Superior Court. August Term, 1875.

Reported in the decision.

SPEER & STEWART; N. J. HAMMOND; BOYNTON & DISMUKE; C. PEEPLES, for plaintiff in error.

R. F. LYON; McCAY & TRIPPE; E. W. BECK, for defendants.

WARNER, Chief Justice.

This was an action brought by the plaintiffs, as partners and contractors, against the defendant, to recover an amount of money alleged to be due them by it, and also to enforce a recorded mechanic's lien under the provisions of the 1959th section of Irwin's Revised Code. There was no contest as to the amount due, but the contested question on the trial of the case was, whether the plaintiffs were entitled to a mechanic's lien on the defendant's road as claimed by them. The jury, under the charge of the court, found a verdict in favor of the plaintiffs' lien upon the defendant's road from Griffin to New-

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nan. The defendant made a motion for a new trial on the several grounds therein set forth, which was overruled by the court, and the defendant excepted.

It appears from the evidence in the record that on the 20th of October, 1869, the plaintiffs made a written contract with the defendant's agent to build its road from Griffin to Newnan, in the manner and upon the terms therein specified. There is nothing said in the agreement as to the plaintiffs being mechanics, or as to their having any lien on the defendant's road for the work which they contracted to do; but the plaintiffs recorded a mechanic's lien on the defendant's road on the 5th of January, 1871.

John T. Grant, one of the plaintiffs, testified that he was a mechanic, had followed mechanical pursuits all his life, took contracts to build houses, bridges, etc.; that he contracted to build the bridges, and did some work on them with his own hands; would saw and mortice, and show others how to do the work; did not do a great deal of work with his own hands. When the contract was made they had two or three hundred hands under their control; Grant, Alexander & Company were partners, organized to build railroads, and other work; he had not followed the trade of a mechanic regularly for the last fifteen years; sub-let some of the work; witness' son, who was one of the company, was also a mechanic, and has, ever since he was a man, been engaged in building bridges, railroads, etc., as a business.

Thomas Alexander, one of the company, sworn, stated that his trade or calling was that of a stone cutter, or mason; that a large portion of the work done on defendant's road, was stone work, some of it he did himself, and some he sub-let to others.

Richard Peters, one of the company, sworn, stated, that he was some thirty years ago a civil engineer; sub-let the largest portion of the work; repaired some of the culverts himself, near Head's creek; built one with his own hands; the company worked convict labor as well as others.

This is substantially the evidence in the record as to the

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plaintiffs being mechanics, and as to *what sort of mechanics* they severally were.

There was no point made here, that the plaintiffs had not substantially complied with the 1963d, and 1964th sections of Irwin's Revised Code, if the plaintiffs were otherwise entitled to their lien on the defendant's road.

The court charged the jury as follows: "This is an action in favor of Grant, Alexander & Company *vs.* The Savannah, Griffin and North Alabama Railroad Company. The amount to be recovered is not in controversy in the case. It is agreed that the plaintiffs are entitled to recover \$17,510 90, with interest from 1st November, 1870, so that your duties on this branch of the case will be easily discharged. The main question in the case is as to whether the plaintiffs are entitled to the lien claimed by them on the defendant's road. When I shall have given you the law on this point of the case you will have as little difficulty as on the other. I am asked to give you in charge:

"1st. If you think the plaintiffs were mechanics when they contracted and did the work, still they cannot recover the lien unless they contracted in their capacity as mechanics. Although the contract does not designate the plaintiffs as mechanics, still if it shows by its very terms, they were employed to do mechanical work, then they were employed as mechanics and can so recover whether or not they did all the work with their own hands; and this is especially so if the defendants consented that the contract should be sub-let. This I give you in charge.

"2d. I charge you, however, that if the contract was with the defendants to build and finish the construction of their road, its bridges, culverts and masonry, and the plaintiffs have been proved to be mechanics, and if they finished the road according to contract, it was a mechanical employment, and as it is with the court to construe the contract in writing, I charge you that the work to be done, by the terms of the contract, is mechanical, and whether the plaintiffs worked as such mechanics or not in the actual construction of the road, still, if

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they undertook to do mechanical work, and then they had the work done by other persons, they can recover as mechanics. And if you believe that the plaintiffs undertook, under and pursuant to this contract, to finish defendant's road as provided in the terms of the contract, and they did so finish it, this constitutes them mechanics and they would be entitled to maintain their lien and would be entitled to have this lien enforced for the sale of the road. Gentlemen, if you believe all the testimony in the case as given you from the stand by the plaintiffs, then you will find in favor of the lien.

"Gentlemen, retire and make up your verdict, unless you can find without retiring. (To counsel for plaintiffs)—'You can write the verdict in proper form.' (Counsel for plaintiffs)—'Perhaps the jury had as well retire, and we can put the verdict in proper form when they come in.'"

1. The plaintiffs did not bring their action against the defendant as mechanics, but brought their action against it as partners and contractors, and were not entitled to recover for a mechanic's lien, as such, as the record stood at the time of the trial; but as we feel constrained to reverse the judgment of the court below and order a new trial, that defect may be cured by an amendment of the plaintiffs' declaration.

2. The great and controlling question in the case, then, will be, when the plaintiffs amend their declaration, (as we think they may do, and sue as mechanics for the enforcement of their alleged recorded lien, as provided by the 1964th section of Irwin's Revised Code,) whether the contract set forth in the record was made by the plaintiffs with the defendant in the *capacity* of mechanics or in the *capacity* of contractors. Contractors may be mechanics as well as those who are not mechanics. Were the plaintiffs mechanics, and did they make the contract with the defendant in the *capacity* of mechanics? If the plaintiffs were mechanics, and made the contract with the defendant in the capacity of mechanics, these facts may be shown by parol evidence, the same not being inconsistent with the written contract, and they may enforce their recorded mechanic's lien, as provided by the before recited sections of Irwin's

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Revised Code. But although the plaintiffs may have been mechanics, if they did not contract with the defendant to do the work in the *capacity of mechanics*, but made the contract with the defendant in the *capacity of contractors*, then they are not entitled to enforce a mechanic's lien against the property of the defendant. Whether the plaintiffs were mechanics, and made the contract with the defendant to do the work in the capacity of mechanics, or whether they made it in the capacity of contractors, were questions which should have been submitted to the jury under the evidence, without any expression or intimation of opinion on the part of the presiding judge as to what had or had not been proved in relation to those questions: Code, section 3248.

3. Whilst it is true that the construction of a written contract, is a question for the court, still, the court is not presumed to know what is mechanical work done under a contract, to constitute one a mechanic, unless the presiding judges of the courts are to be considered as *experts* in regard to what does constitute a mechanic, mechanical work, and mechanical operations generally. We think it much the safer rule to leave these questions to the decision of the jury under the evidence of witnesses who may or may not be *experts* as to such questions, rather than to the decision of the presiding judge of the court. In view of the evidence contained in the record the charge of the court was error.

Let the judgment of the court below be reversed.

AUGUSTUS R. WRIGHT, plaintiff in error, vs. ALFRED SHORTER, defendant in error.

(This case was argued at the last term and decision reserved.)

1. Where an imperfect plea, stricken by the court below, on motion or general demurrer, indicates strongly that there is in the facts a meritorious defense, this court will direct that the plea be reinstated on terms, and that the opportunity for amendment be allowed.

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2. *Dicta* on the position of guarantors of payment, with reference to diligence by creditors.
3. A general guarantor of payment who has received value in negotiating a note, is not discharged by judgment in favor of the maker in a suit upon the note, unless the judgment was the result of some fault or default in the plaintiff; and if the latter has pursued the case to an adverse termination in the highest court of this state, he is not bound to carry it up to the supreme court of the United States.
4. When bridge and ferry franchises purporting on the face of the grant to be exclusive, are conveyed by deed in fee simple, with warranty of title against the vendor and his heirs only, the purchaser, in the absence of any fraud in the vendor, takes the risk of the grant's proving exclusive or not exclusive in its legal operation.
5. If the grant purport to create franchises which are exclusive for three miles up and down certain rivers, and the vendor represent them to be exclusive, and the price is fixed accordingly, both parties believing them to be exclusive, but being mistaken on account of a defect of legal power in the inferior court to pass exclusive franchises, the purchaser, when sued by the vendor for a balance of the price or upon a contract of guaranty involving such balance, cannot set up the non-exclusiveness of the grant as partial failure of consideration, nor as a ground of recoupment, although the value of the grant as it really is, be much less than the amount already paid on the price, and far less than the value would have been, had the grant been exclusive as it was supposed to be, there being no express warranty by the vendor that it was exclusive, and no fraud by which the vendee was deceived or misled.
6. As the grant in fact existed, although not exclusive, there was a subject matter for the contract to operate upon. The circumstance that the grant is less extensive or less valuable than it was believed to be, does not negative the existence of the subject matter itself but only of some of its supposed attributes.

Practice in the Supreme Court. Guaranty. Promissory notes. Franchise. Roads and bridges. Grant. Warranty. Before Judge BUCHANAN. Floyd Superior Court. January Term, 1875.

Shorter brought assumpsit against Wright, on a written guaranty of the payment of a note on J. L. Cobb and James Morris, security, for \$2,500 00, dated July 16th, 1861, and due at twelve months, with interest from date. This guaranty was dated August 14th, 1862, and embraced other notes transferred by defendant to plaintiff, but not involved in this suit. The defendant pleaded, in substance, as follows:

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1st. That defendant had no notice of the non-payment of the note set forth above for three or four years, and in the meantime the makers became insolvent, though worth at the time of the guaranty \$100,000 00; that, when the note was transferred, defendant informed plaintiff that it was given for negroes, and informed him also that he, defendant, had been notified that the money was ready to be paid upon call, and that nothing was to be done but to present the note; that plaintiff not only failed to present it or call for the money, but avoided payment by carrying the note to Thomas county, his then residence being known to but few; that plaintiff so avoided the payment of said note because Confederate money, which was the usual currency at that time, and also when the contract was made, was below par; that defendant, having no notice of the non-payment of the note, supposed it paid.

2d. That the note was given for negroes, and such notes having been held void by the courts, the makers were released, and defendant, as guarantor, thereby discharged; that if he had received notice of non-payment, he would have paid it himself or caused it to be paid.

3d. That the consideration of the contract of guaranty had partially failed; that such consideration was a sale and conveyance in fee simple by plaintiff, with warranty against himself and his heirs only, of a half interest in certain described bridges and ferries, and bridge and ferry privileges; that the grant to plaintiff of such privileges by the inferior court purported to be exclusive for three miles up and down the rivers; that plaintiff so represented them, and that both parties entered into the contract of guaranty by mistake, with this understanding; that such privileges were not in reality exclusive, the supreme court having decided that the inferior court had no power to render them so; that the consideration has therefore failed to the extent of the difference in value between the exclusive franchises and franchises not exclusive, amounting to about \$20,000 00 or other large sum. This plea also claims the right to recoup in behalf of defendant for such difference in value.

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4th. That plaintiff did not use due diligence in suing the note, but allowed three or four years to pass before doing so; that by reason of this neglect the note was lost, because the makers were solvent when the note was transferred to plaintiff, and became insolvent before suit; also, that after suit was brought, plaintiff failed to prosecute it with due care and diligence, and after carrying the case to the supreme court of Georgia, failed to carry it to the supreme court of the United States, where similar decisions of the state courts were afterwards overruled.

5th. The general issue.

Upon demurrer, all of the aforesaid pleas were stricken except the last, and the defendant excepted. The jury found for the plaintiff \$1,136 36, with interest from July 1st, 1870.

Error is assigned upon the above grounds of exception.

WRIGHT & FEATHERSTON, for plaintiff in error.

R. D. HARVEY; C. ROWELL, for defendant.

BLECKLEY, Judge.

1. This case has been long and anxiously considered; on my part, painfully. The true law of it, in so far as it involves the doctrine of guaranty, seems to me yet not quite free from doubt. Partly for that reason, I gave my consent to a reversal of the judgment, on terms, to afford opportunity for amending the first special plea. That plea, it will be perceived, does not rest simply on the law of guaranty in general, but strongly indicates that at the time the guaranty was entered into there may have been a promise by Shorter, express or implied, that he would call for the money then said to be ready. The plea is defective, (if it be the purpose of it to allege such a promise,) in not setting out what Shorter said on the occasion, or the fact that he was silent, giving ground tacitly to infer the promise. If, by word or conduct amounting to a promise, he induced Wright to believe that he would call for payment and get the money then said to be

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ready, and Wright relaxed all vigilance on that account, and did not become aware until after the makers of the note were no longer solvent, that payment had not been called for as he was induced to believe it would be, Wright ought not now to suffer. To make him suffer, under such circumstances, would be to excuse a breach of faith, and overlook an injury to him amounting to substantial fraud. Inasmuch as the note was over-due, and the contract of guaranty fixed no time or place of payment, the writings are, perhaps, not inconsistent with the theory that Shorter was to call for the money then represented to be ready.

2. In so far as the pleas, or any of them, rest alone on the bare law of guaranty, they are overruled by this court, as they were by the court below. Speaking for myself only, I will briefly classify guarantors, and then point out what I take to be the true position of some of them in regard to diligence on the part of creditors: Guarantors, viewed in reference to the *consideration* of their contract, are either mere sureties or more than sureties. They are mere sureties when the consideration of the guaranty moves, not to them, but to the person for whose performance they become bound. They are more than sureties when the consideration is a benefit flowing to themselves: 2 Parsons on Contracts, 21, 22; Code, section 2148. Regarded in reference to the *substance* of their contract, they undertake, either for the collectibility, or for the payment of the given debt. A guarantor of any class may, by his contract, limit his liability according to his own pleasure, and stipulate for such diligence or preliminary action on the part of the creditor as he may choose to exact. In the absence of any special terms, the most favored guarantors are those who are mere sureties and guarantee collectibility only; and the least favored are those who, for a consideration moving to themselves, guarantee payment. If the guaranty be of the payment of a pre-existing debt, and expressed in general terms, the guarantor, if a mere surety, cannot insist on a higher degree of diligence in the creditor than could be exacted in the same case and under the same circumstances, in behalf of

the most favored class of sureties, such as accommodation indorsers; nor can he, if more than a surety, require greater diligence than might be demanded in behalf of the most favored class of debtors receiving value, such as indorsers for value. In some respects, the condition of a general guarantor of payment is less advantageous than that of an indorser, but in no respect is it more advantageous. To gain a better *status* than that of an indorser, the guarantor must vary his general liability by express stipulation. In those states where indorsers are entitled to notice of non-payment, guarantors of similar debts might, upon principle, be entitled to notice also; but not necessarily to equally strict and formal notice, diligence in case of indorsers, being more influenced by reasons of commercial policy than diligence for the behoof of guarantors. Less than commercial expedition, or the ordinary transmission by mail, will scarcely suffice in giving notice to indorsers; whereas, it is sufficient anywhere that guarantors be notified in time to prevent loss by insolvency, etc., with no restriction to the first appropriate opportunity. In states (as in Georgia) where the general rule is, by statute, that indorsers are not entitled to any notice whatever, a guarantor of payment may consistently be denied notice of non-payment, supposing his guaranty to be concerning a class of paper to which the general rule applies. The change of policy which is involved in doing away with notice to indorsers is so radical that its spirit reaches and includes guarantors in like cases. In a system of diligence which expressly dispenses with notice to the former, there would seem to be no place for a rule requiring notice to the latter. The broad *reason* of notice is repealed by a statutory denial of its application to indorsers, they being the great representative class with reference to which the law of notice has, for the most part, been moulded. It would be a striking anomaly for an absolute guarantor of payment to stand discharged for want of notice under circumstances that would leave an indorser still bound. Our statute has been construed to embrace drawers (though not named) and to dispense with notice as to them: 34 *Georgia*,

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558; *Powell & Jones vs. Phillips, jr., & Company*, January term, 1876; *High vs. Cox*, *Ibid.* Compare, however, 41 *Georgia Reports*, 614; 44 *Ibid.*, 63. What has been said of notice will apply, in substance, to demand, bringing suit against the principal debtor, and other acts of diligence. No higher standard of general diligence can be insisted upon by guarantors of absolute payment than indorsers, in the like case, would have a right to call for. Either might give the statutory notice to sue, and stand upon the consequent right to special diligence. Were the paper before us "bank paper," negotiated before due, the doctrine of demand and notice of non-payment would still, notwithstanding the statute, apply to it in favor of an indorser, and might apply, to a certain extent, in favor of a guarantor; but the paper has neither of these characteristics. It was guaranteed after due, and was payable generally—not at bank. The authorities touching the measure of diligence to which the creditor is bound in favor of a guarantor are very numerous, and not altogether harmonious. Scores of them have been examined in the course of our investigations in this case. They are largely collected in 2 *American Leading Cases*, 1 to 141. If, as a whole, they can be squared with any general principle, they seem to me not to run counter to the line of thought which I have pursued above. Wherever indorsers and guarantors of payment of pre-existing debts are compared, the latter, I think, will generally be found to be put on a lower plane than the former, never on a higher.

3. The third head-note needs no expansion. It can scarcely be questioned as law; and the plea to which it applies, taken as a whole, presents no valid defense.

4, 5. The fourth and fifth head-notes are full enough; and if in need of authority, will be found supported by 6 *Lansing*, 56, and 6 *Blackford*, 389; see, also, 31 *Alabama*, 435.

6. The ground upon which this case is distinguished from that in 37 *Georgia Reports*, 423, is indicated in the sixth head-note. Here there is a legal subject matter in existence; in that case there was none.

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The judgment of the court upon the whole record is as follows: "Reversed, with direction that the court below reinstate the first plea for readjudication, provided the plaintiff in error, after paying all costs incurred on this writ of error in either court, will amend said plea on oath, alleging distinctly the full response of the defendant in error, or his failure to respond, on the occasion of being informed, as now alleged in the plea, touching readiness of the money, etc. If the terms here prescribed be not complied with at the first term of Floyd superior court, let the judgment of the court below stand affirmed; and in either case, let all the special pleas remain stricken except the first."

VALENTINE ZIMMER, plaintiff in error, vs. WILLIAM F. DANSBY, defendant in error.

If the legal title to land be in the husband and he holds the possession thereof under such title, and the title and possession so remain until a creditor, who gave credit on the faith that the property was the husband's, without any notice of the wife's equity, reduces his debt to judgment, the lien of such judgment will bind the land and will be enforced against a secret equity of the wife, resulting from the fact that her money paid for the land.

Husband and wife. Levy and sale. Debtor and creditor. Before Judge BUCHANAN. Troup Superior Court. May Term, 1875.

Reported in the opinion.

B. H. BIGHAM; T. H. WHITAKER, for plaintiff in error.

FERRELL & LONGLEY, for defendant.

JACKSON, Judge.

The defendant obtained judgment against Joseph Sanders on the 22d of May, 1866, and the execution issued thereon was levied upon a tract of land which Dansby claimed. On

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the trial of this claim, plaintiff in *fi. fa.* proved possession in Sanders from 1860 up to judgment, and since, until within two or three years of the trial, and introduced a deed from Johnson to him, dated 11th of July, 1860. Claimant showed a deed to him from Sanders and wife dated 19th day of November, 1870, made by the approval of the ordinary, and proceedings before the ordinary showing that the land had been set apart as a homestead to Sanders on his application the year before; also a deed from Sanders to his wife, dated the 4th of September, 1866, and recorded that day; and proved by Sanders and wife that some money which the wife inherited in Alabama paid for the land; and further showed that this money was her separate estate by the law of Alabama. On this state of facts the court charged that if the jury believed that the land in question was paid for by the money of the wife, acquired as her separate estate in Alabama, the land was not subject, and that the deed so made by husband and wife, of the homestead, conveyed the wife's title to claimant; and declined to charge that if plaintiff credited defendant in *fi. fa.*, *bona fide*, believing this property to be defendant's, without any notice of the wife's equity or trust, then the land is subject. The jury found the land not subject; the plaintiff moved for a new trial on the above charge and refusal to charge; the court refused to grant it, and this is the error assigned.

This debt was created prior to the constitution of 1868. Therefore no right against the judgment vested in the husband and wife by the homestead. If it had vested, the sale was illegal under the ruling of this court in *Roberts and wife vs. Trammell*, page 383, and claimant acquired no title. The homestead is therefore out of the question, and makes the case no better or worse for either side. The wife, however, signed the deed; the court below held that she conveyed thereby whatever title she had, and the claimant stands in her shoes and is subrogated to her rights. Suppose that this is a correct view of the law in respect to the rights of the claimant against her, and that she would be estopped in a contest with him,

and that he acquired all her title, then the question narrows to this point, what is her title against this judgment? The judgment was rendered in May, 1866; her husband's deed to her and its record was in September, 1866; and that judgment operated as a lien on his property from its date. The legal title to this property was in him, the husband, at the date of the judgment; the deed was to him alone, and the possession was in him; there was no record of the wife's title or of any equity in her when he got the credit or when the judgment was rendered, therefore there was no constructive notice to this judgment creditor, and the record discloses no actual notice to him of this equity of the wife. It is therefore a secret equity arising from a secret trust, so far as this creditor is concerned, and the naked question made by the request to charge and the refusal to do so, is, can such a secret trust, such a concealed equity, prevail to set aside a judgment lien obtained without any notice of its existence, actual or constructive? Which is the better equity, the creditor's judgment lien, *he having credited on the conviction that this was the debtor's property*, and the debtor having used the proceeds of the credit, doubtless for the benefit of his wife and himself? Which is the better equity, the creditor's judgment lien founded on such a debt, or the wife's secret equity covered up in this secret trust? We think, that in principle, there can be but one answer. The honest creditor, who gave the credit on the strength of this property, should be preferred.

The analogies springing from our statute laws in relation to husband and wife at the time of the purchase of this land in 1860, strengthen this view of the law. At that time, the marital rights of the husband attached to the wife's property as a general rule, and all marriage settlements had to be recorded, or such settlements were void against *bona fide* purchasers or creditors. This money was brought into Georgia by the husband, no notice given that it was his wife's, the deed was taken to the husband, and he appeared as absolute owner until after the judgment, and then for the first time the wife's equity is recorded in the shape of a deed from him to

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her. It is true that there is no law requiring a record of such a transaction, as in the case of marriage settlements, but the reason and spirit of the two cases is the same. As the law stood then, the husband was the master, the owner of all the ostensible property, and if the wife had any title to any part of it, derived from a marriage settlement, it had to be made known to warn creditors not to trust the husband on his apparent ownership. Why, if she had title to any part of it, otherwise derived, should not notice also be given, either by record, constructively or actually, by informing the creditor? It is right that it should have been done in both cases. We think the principle ruled in this case now was practically decided in *Humphrey vs. Copeland*, 54 *Georgia Reports*, 543. There we held that "a judgment creditor who is protected against a mere equity in his debtor's property for want of notice before his judgment lien attaches, may, when the property is sold to satisfy the judgment, purchase and hold it disincumbered of such equity, though he, in the meantime, receive notice." That principle controls this case. Nor do we think that the cases of *Burke et al. vs. Anderson*, 40 *Georgia Reports*, 535, and *Gray vs. Perry et al.*, 51 *Ibid.*, 180, necessarily conflict with this ruling in *Humphrey vs. Copeland*, and now repeated in the present case. In *Burke vs. Anderson* the reasoning, we admit, is the other way, and would, perhaps, lead to a different conclusion from that now reached by us here; but the facts are different, and the judgment was simply that equity would grant relief to correct a mistake against *bona fide* creditors, though it would not against a *bona fide* purchaser without notice, and this seems grounded mainly on the statute: Code, section 3119. Then the only exception is the case of the *bona fide* purchaser, and *inclusio unius exclusio alterius* would apply; whereas, in marriage settlements, a closer analogy to this case, creditors are also expressly embraced: Code, section 1778. In the case in 51 *Georgia Reports*, *Gray vs. Perry*, the debt was in existence at the time the property went into possession of the hus-

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band, and the creditor could not have credited on the faith of that property.

We forbear to say anything upon the question how far the law of Alabama, giving the wife a separate property in money, would be enforced in Georgia when that money was invested by the husband in lands in Georgia, as no point is made upon it.

We see no error in the ruling on the admissibility of the evidence of Mr. and Mrs. Sanders. There does not seem to have been any record or better evidence of the money having been the wife's in Alabama.

We reverse the judgment because we think the court erred in holding that this property was not subject to this judgment, if the creditor credited on the faith of its being the debtor's, and had no notice of the wife's equity.

Judgment reversed.

J. A. P. METHVIN, plaintiff in error, *vs.* MARY J. SHORTER *et al.*, defendants in error.

(JACKSON, Judge, having been of counsel, did not preside in this case.)

On the facts of the case there was no abuse of discretion in granting a new trial, whether the judge erred in any of his rulings on the former trial or not. If he did err, as he has granted a new trial, it is fair to presume that he will discover and correct his own errors.

New trial. Before Judge WRIGHT. Quitman Superior Court. November Term, 1875.

Report unnecessary.

J. H. GUERRY; GUERRY & SON, for plaintiff in error.

A. HOOD; S. W. GOODE, for defendants.

BLECKLEY, Judge.

After verdict finding the property levied upon subject, the claimants moved for a new trial on fifteen grounds, among

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them that the verdict was contrary to evidence. The court granted a new trial, and that judgment is the one sought to be reversed.

When the grant of a new trial is, as in this case, general, not put by the presiding judge upon any particular ground or grounds of the motion, it should be assumed that whatever errors the judge committed on the trial, he has discovered for himself and means to correct for himself. If, in the motion, there be a single ground upon which the order for a new trial is clearly warranted, an affirmance by this court must necessarily follow; and when that result is arrived at, it seems mere *amateur* work to search for errors, which when found, will be of no avail against the judgment under review.

On looking into the evidence, and treating the verdict as an entirety, the whole of the property under levy having been found subject, we are unable to pronounce that the judge abused his discretion in granting a new trial. With such evidence as we find in the record, the first grant of a new trial should undoubtedly be acquiesced in. The discretion of the judge is wide, and we are determined not to contract it.

If, in charging the jury, or otherwise, the judge committed any errors, he will have an opportunity of correcting them on the second trial. As he has ordered a new trial the whole case is still within his control, and he may give to it such final shape as will leave no cause of complaint to either party.

Judgment affirmed.

NEAL FELTON, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

1. If there be sufficient evidence to sustain the verdict, this court will not control the discretion of the court below in refusing to grant a new trial on the ground that the verdict is against the weight of the evidence.
2. In a case where the testimony clearly shows that the defendant is guilty of more than a bare assault, it is not such error to refuse to charge that the jury may find him guilty only of the assault, as to require the grant of a new trial.

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3. Newly discovered evidence which tends only to impeach a witness, will not authorize the grant of a new trial, especially if the effort to impeach be the sayings of the witness sought to be impeached, spoken subsequently to the trial.

Criminal law. New trial. Charge of court. Before Judge McCUTCHEM. Bartow Superior Court. July Term, 1875.

Reported in the opinion.

G. H. BATES; R. W. MURPHY, for plaintiff in error.

A. T. HACKETT, solicitor general, by E. P. HOWELL, for the state.

JACKSON, Judge.

The defendant was indicted and convicted of this offense, and moved for a new trial on three grounds, to-wit: because the verdict was against the evidence and the law; because the court erred in declining to charge that, under the facts of the case, the defendant could not be found guilty of a bare assault; and because he had discovered new evidence since the trial. The court overruled the motion, and error is assigned on each ground above specified.

1. The evidence is abundant to sustain the verdict. The defendant threw the girl down, stopped her mouth to suppress her cries for help, put his hand under her clothes, and in his effort to effect his purpose made her mouth bleed, and otherwise bruised her person; and only desisted when her grandmother, hearing her cries, called out to him to desist.

2. The facts show much more than an assault. Such a verdict, a bare assault, ought not to have been returned; the facts would not make that crime, but made much more; and while the jury might have found such a verdict against facts and law, it is extremely improbable that they would have done so. At all events, we have no idea that the charge, if given, would have altered the verdict; it certainly ought not to have done it, therefore we will not interfere.

3. The newly discovered evidence consists entirely in say-

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ings of the witness, the girl, *after the trial*. A new trial should not have been granted on them for two reasons: first, because they go to impeach her evidence only, and secondly, because they were spoken after the trial. If the principle were once established that proof of such sayings so spoken would set aside a verdict, and open the case again, verdicts would cease to stand, and crime would go always unpunished, for it would be easy, for love or money, to get some witness to say something contradictory to his evidence on the trial.

Judgment affirmed.

M. J. ATKINS & COMPANY, plaintiffs in error, vs. J. L. & R. H. COBB, defendants in error.

1. The copy of the draft and indorsement thereon, annexed to a declaration, framed in the brief statutory form, is part of the declaration itself, and may be used to aid defective allegations. The indorsement need not be alleged if it is copied.
2. An indorsement "for collection," made by the payees, is canceled by their subsequent indorsement to other indorsees for value.
3. When the defendants are allowed to defend as fully as if the bill had not been negotiated, it is immaterial on what consideration, or for what purpose, or with what motive, the payees transferred or the plaintiffs acquired, title to the paper.
4. Unfriendly feeling between the parties should not go in disparagement of the defense. The motive that induced the filing of the plea is immaterial; the question for the jury is whether the plea is true or not true.
5. Goods ordered are, after acceptance, presumed to be of the quality ordered. The burden of proving them inferior is on the purchasers, who must establish the fact with that degree of certainty which suffices in civil cases generally. They need not go beyond this in clearness or force of evidence.
6. That the purchasers made partial payment, with knowledge that the goods were, in quality, inferior to those ordered, will not hinder them from pleading the defective quality as partial failure of consideration when afterwards sued for the balance of the price.
7. The abatement of the purchase money for goods sold with warranty of quality, express or implied, should be equal, at least, to the difference between the agreed price and actual value as reduced by defective quality. Purchasers are entitled to this abatement whether, in disposing of the goods,

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they lost anything or not. What they realized is of no consequence, except as it may tend to illustrate the question of value.

8. In order for a sale to illustrate value, the medium of payment, as well as the price, should be regarded. If the sale were for uncurrent funds, the value of such funds at the time and the place of the transaction is material.
9. On a plea of partial failure of consideration for defect in quality of goods, it is not competent for the purchasers to prove, in general terms, that they sold a large quantity of the goods for uncurrent funds, and that the funds were a total loss.

Pleadings. Indorsement. Negotiable instruments. Sales. Presumptions. Warranty. Evidence. Before Judge TOMPKINS. Randolph Superior Court. May Term, 1875.

Reported in the opinion.

A. HOOD; H. & I. L. FIELDER, for plaintiffs in error.

B. S. WORRILL, for defendants.

BLECKLEY, Judge.

1. The action was against the acceptors upon a bill of exchange, and was in the short form allowed by the Code, section 3391. The bill was payable to the order of the drawers, and no indorsement by them was alleged or set out in the body of the declaration. A copy of the bill as accepted, and a copy of an indorsement thereon by the payees to the plaintiffs were annexed to the declaration, and these, we think, constituted a part of the declaration itself. Our brief statutory declarations are not intended to be complete without full copies of the instruments declared upon, and such copies may always be used in aid of informal or defective allegations. Taking the whole together, there was a cause of action set forth in this declaration in favor of the plaintiffs against the defendants, and the demurrer was therefore properly overruled: See *Jennings vs. Wright & Company*, 54 *Georgia Reports*, 537; *Bank of Americus vs. Rogers*, 55 *Ibid.*, 29.

2. When the bill was tendered in evidence it had upon it two indorsements from the payees, one to Gunn "for collection," and the other to the plaintiffs "for value received."

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The former was without date; the latter was dated four days before the present action was brought. An indorsement for collection is, as against the indorser, a mere power of attorney to receive the money. It imports an agency to collect, and nothing more. The bill remains the property (in equity, at least,) of the indorser; and when it is returned to him, he may sue and recover upon it in his own name without erasing the indorsement: 2 Parsons on Notes and Bills, 442; 22 Georgia Reports, 24. If, instead of bringing suit, he negotiate the bill, and indorse it over for value, the second indorsement necessarily revokes the agency created by the first. It cancels the first indorsement as effectually as could be done by erasing it. The indorsement for collection did not, therefore, stand in the way of the plaintiff's title to the bill, under the indorsement made to them for value; and the objection to receiving the bill in evidence was not sustainable.

3. The title of the holder of negotiable paper cannot be inquired into further than is necessary for the protection of the defendant or to let in the defense which he seeks to make: Code, section 2789; 31 Georgia Reports, 300. The court charged the jury that the plaintiffs, having taken the bill after maturity, stood in the same position as the payees in reference to the defense set up and the equities between the parties. In connection with this charge, it was altogether proper for the court to instruct the jury as it did, to the effect that the defendants had no concern with any fraud intended by the payees in parting with the bill, or by the plaintiffs in procuring it, or with the motive, purpose or consideration involved in the transfer. The indorsement was regular; the payees were making no contest with the plaintiffs, and the defendants had no right to make any, on the *bona fides* of their title. It was wholly irrelevant to the issue on trial whether the plaintiffs took the bill on speculation, as the defendants' counsel contended, or not.

4. In like manner, it was no concern of the plaintiffs' what induced the defendants to set up the defense which they opposed to the action. The court erred, therefore, in charging

the jury that evidence of unfriendly feeling existing between one of the plaintiffs and one of the defendants might be considered by them in coming to a conclusion whether or not the defendants were induced to set up a defense to the bill in the hands of the plaintiffs, which they were not entitled to set up, and would not have set up to it, against the payees. The defendants had the same right to defend the action that the plaintiffs had to bring it. The motives of neither were in question. The plaintiffs might sue angrily and the defendants might defend angrily. The plea might have been filed in the worst of temper; but was it true? That was the question for the jury; and it was altogether needless for them to consider what induced the defendants to plead a false plea, or whether they would have pleaded it against the payees or not. The merit or demerit of a defense is not dependent, in any degree, upon the absence of friendly relations between the parties. Friends and enemies stand on equal ground before the courts.

5. The bacon, for the price of which the bill was drawn and accepted, having been received by the purchasers and retained by them, the court was correct in charging the jury that the presumption of law, in the absence of evidence to the contrary, was that the article was of the quality ordered. It is doubtful, however, whether the charge was precisely accurate in the further statement that the contrary must be established *clearly* and satisfactorily by proof. The degree of certainty required in civil cases generally, is only that which results from a preponderance of testimony: Code, section 3749. The proof should go far enough to be satisfactory to the jury, but this it might do, perhaps, without being perfectly *clear*: 7 *Georgia Reports*, 467. The jury are not much concerned with any characteristics of the evidence except truth and force. Some degree of obscurity, and even of confusion, may exist without destroying its credit or robbing it of the power to produce conviction. The clearest evidence is not always the *most* trustworthy.

6. There were two credits on the draft, one for cash and one for hams returned. The court charged the jury that if

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believed the defendants, "after they had received the draft, and inspected the same and knew its quality, made payments on the draft, the jury can look to all the facts and see whether they have a right to set up the plea of failure of consideration, and if not, are bound to pay the entire balance due on the draft." Even if this charge is not objectionable for assuming inspection, etc., before the payments were made, it seems erroneous, for the reason that it submits to the jury for their decision a question of law, namely: whether the defendants had a right, under the circumstances named, to set up the plea of failure of consideration. We think, as a matter of law, that the defendants did have the right, and the judge should so have ruled instead of referring the question to the jury. Whether the plea was true was for the jury; but whether the defendants had a right to set it up, notwithstanding partial payments had been made, was for the court. By the plea of "failure of consideration" we take it for granted that the court meant partial failure of consideration, for that was the kind of plea filed; not one of total failure.

7. The object of the plea was to obtain an abatement of the purchase money for defect in quality of the bacon. The evidence tended to show that some of the bacon was unsound; that it was bought for first quality, and turned out to be, as to a part of it, far inferior; indeed, quite, or very nearly worthless. The agreed price was thirteen and a half cents and the actual average value, according to the evidence of one of the defendants, was not more than eight cents. The plaintiff alleges that it was not above nine cents. The true rule of abatement, in the absence of special damages, is to reduce the agreed price as much as the actual value is reduced by reason of defective quality. Where quality is warranted, expressly or by implication, that much abatement, at least, may be exacted by purchasers, whether, on re-sale, they actually sustain loss or not: 46 *Georgia Reports*, 261, 464. Whether the value realized on re-sale may illustrate value, but, except for that purpose, is not pertinent to the issue. The court was therefore, in charging the jury that defendants must show

amount they *lost*, and if they have lost nothing, the plaintiffs are entitled to recover the full amount sued for, whether or not the bacon was of the quality sold, or whether it was worth full price or was of little or no value.

8. A certain parcel of the bacon was sold in bulk by the defendants, and was afterwards ascertained to have been unsound and unsalable. The purchaser being on the stand as a witness for the defendants, he was directed by the court to state the price at which he purchased. Having answered that it was eighteen cents, he was not permitted by the court to add that he paid "Kimball currency," which was, at the time, uncurrent, and that he would not have purchased if he had had to pay in any other currency. What the price represented was as material as the price itself. When an actual sale is proven to illustrate value, the kind and value of the funds in which payment is to be made, should be taken into account. But the court, throughout the trial, seems to have gone upon the theory that though the bacon was unsound, the verdict was not to be governed by the question of value, but by the fact of loss or no loss to the defendants. This theory, as we have seen, was wrong. Yet, even upon this erroneous theory, we are unable to see why the court excluded the evidence under consideration. Surely if eighteen cents in "Kimball currency" was less than eighteen cents in money, the defendants lost more in a given transaction than if they had sold for money instead of the "Kimball currency."

9. The court was right in excluding evidence, in general terms, that the defendants sold much of the bacon for "Kimball currency," and that the currency was a total loss. What was the bacon worth? Transactions in it which did not throw light on that question could have no proper place in the testimony.

We abstain from expressing any opinion of our own upon the sufficiency of the evidence to uphold the verdict. We have confined ourselves to correcting what we deem errors of law committed by the court. For these errors a new trial is granted.

Jordan vs. The State of Georgia.

JOHN JORDAN, *alias* JOHN STEGER, plaintiff in error vs
THE STATE OF GEORGIA, defendant in error.

1. An indictment for this offense under section 4488 of the Code, should allege that the principal thief has been tried and convicted of the offense; if such principal cannot be taken so as to be prosecuted and convicted, then the accessory in receiving the stolen goods should be indicted under section 4489 for a misdemeanor.
2. Under an indictment for being accessory by receiving stolen goods when the principal thief is only charged with simple larceny, the evidence should be confined to that, and it is error to admit an indictment for burglary and a plea of guilty thereon.
3. The indictment should specify the particular offense of which the principal thief was convicted, whether larceny from the person or the house or simple larceny or burglary, so that the record of the court—the pleadings—shall show that the judgment or sentence is right according to the case made. The punishment of the accessory varies with that of the principal. In burglary in the night, it may be twenty years in the penitentiary, in larceny from the house, ten years, while in simple larceny it would be fine or imprisonment in jail, or work in the chain-gang.

Criminal law. Accessory. Indictment. Before Judge
TOMPKINS. Spalding Superior Court. August Term, 1875.

Reported in the opinion.

HUNT & JOHNSON, for plaintiff in error.

T. B. CABANISS, solicitor general; E. P. HOWELL, by Z.
D. HARRISON, for the state.

JACKSON, Judge.

This case was an indictment for being an accessory after the fact in receiving goods stolen from another. The indictment did not set out that John King had been convicted or charged with any offense at all, or tried for any offense. It simply alleged that the defendant received from John King a gold watch worth \$100 00, the property of one J. N. Rosser, knowing that it had been stolen and taken and carried away from Rosser before that time. There is no allegation that in taking and carrying the gold watch away, that it had been taken from

a house, so as to make defendant accessory to larceny from the house, nor that it had been taken in a burglary, so as to charge him with being accessory to that crime; yet the court punished the defendant for being accessory to larceny from the house, of which there was no charge at all; and admitted a bill of indictment for burglary against John King, with his plea of guilty thereon. We think this bill of indictment, if good at all, only good to charge that defendant was accessory to simple larceny, and that the proof should have been confined to that, and the punishment should have been the same as for simple larceny. If the proof make a case of larceny from the house the indictment should allege it, so that the record will show that the judgment or sentence of the court accords with the indictment. The punishment for such an offense may go up to ten years confinement in the penitentiary. If the proof make a case of accessory to burglary, the indictment should charge that offense on John King, when the punishment may go as high as twenty years, if at night, as was this proof. The punishment of the accessory varies with that of the principal: Sections of the Code 4488, 4388, 4414, 4310, 4489. In this case even larceny from the person is not charged, but the offense charged is that of being accessory only to the offense of simple larceny, and punishable under section 4310 of the Code; that is to say, just as ordinary accessories after the fact are punishable. We think, therefore, that the court erred in admitting the record of the burglary and plea of guilty thereon and all parol evidence of larceny from the house. The charge is accessory to simple larceny; the proof should have been confined to that. But is the indictment good even for that? We think not. It does not allege the conviction of King for any offense. The Code, sections 4488 and 4489, construing them together, seem clearly to provide that unless the principal thief can be taken and convicted, the accessory must be indicted for a misdemeanor. If, therefore, the indictment be under section 4488, it must allege that the principal thief has been convicted of the larceny or burglary by which the goods received were stolen. We

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can see no other sensible construction of these sections. This, too, was the rule at common law: 4 Blackstone, 263. It was more stringent, indeed, requiring sentence and punishment. The statute of Anne altered the rule so as to provide for the trial of the accessory after conviction, if he escaped before punishment. So these sections provide for indictment as a misdemeanor if the principal cannot be taken. We therefore think that this indictment should be quashed, and a new indictment be framed to conform to the facts here proven; if desirable to indict again, it should be distinctly alleged that John King got possession of these goods by the burglary of which he was duly tried and convicted, and this defendant received them from him knowing the facts. Then the *allegata* and *probata* will agree, and the record will show that the proper punishment has been inflicted upon the defendant, if found guilty of being such an accessory. Inasmuch as this ruling quashes this bill of indictment, and a trial under a new bill will make an entirely different case, it is unnecessary to go further into the consideration of other errors complained of.

Let the judgment be reversed and the indictment be quashed.

WILLIAM HARRIS, plaintiff in error, vs. JOHN J. W. GLENN
et al., defendants in error.

1. The act of February 27th, 1874, declaring that property exempted from levy and sale by section 2040 of the Code, shall not be exempt as against the purchase money, applies to a mortgage executed for the purchase money of land prior to the passage of the act.
2. Debtors have no vested right not to pay their debts. Exemption of their property from legal process for the satisfaction of creditors is but a privilege; mere grace and favor, dependent on the will of the state. Statutory exemptions are subject to be reduced or revoked by the legislature, and constitutional exemptions, by the people, through a change of the organic law.
3. The judgment foreclosing a mortgage is a final adjudication that the debt is due and that the property is subject to pay it. It is a specific judgment

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against the specific property, and if the mortgagor had the defense of exemption, and meant to urge it, should he not have presented it in answer to the rule *nisi*? *Quære.*

4. After judgment of foreclosure has been rendered, and after the law granting exemption has been repealed, it is too late to have a portion of the land laid off, and, for the first time, assert exemption against the mortgage debt.
5. It is too late, also, to say that the debt was not due according to the real contract between the parties, or that payments had been made before foreclosure which were not credited.
6. Land subject to levy and sale for purchase money, and under mortgage for the same, is not disincumbered so long as any of the purchase money remains unpaid. No part of the tract is free until the whole debt is discharged. See *Sale vs. Wingfield*, decided at the present term.

Homestead. Vendor and purchaser. Laws. Debtor and creditor. Constitutional law. Mortgage. Before Judge HALL. Newton county. At Chambers. January 8th, 1876.

Reported in the opinion.

EMMETT & WOMACK, for plaintiff in error.

MCCAY & TRIPPE; J. C. BARTON, for defendants.

BLECKLEY, Judge.

In 1871 the vendor of certain lands conveyed the same by deed to the vendee. At the same time the latter gave to the former a mortgage upon it to secure the purchase money. Part of the money was paid in 1872, part in 1873, and part in March, 1874. These payments, altogether, amounted to about two-fifths of the price. In March, 1875, the vendor commenced the ordinary proceeding at law, to foreclose the mortgage for the balance. A rule *nisi* was granted; and in September thereafter, the mortgage was foreclosed in due form by rule absolute. In November following, the mortgage *fi. fa.*, founded on this foreclosure, was levied upon the land. While the sheriff's advertisement for sale was running, the vendee made out a schedule claiming certain personalty and seventy acres of the land as exempt, returned the same to the ordinary, and had it recorded, in terms of section 2042 of the

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Code. He also had the seventy acres surveyed and a plat thereof made and recorded, as required by section 2042 of the Code. The whole tract contained two hundred and fifty acres. The claim of exemption was not under the constitution, but under section 2040 of the Code, the vendee being the head of a family and having four children under sixteen years of age. When he created the debt he had seven children under that age. The sheriff, on the 4th of January, 1876, sold the whole tract under the levy, disregarding the claim of exemption, full notice of which was given at the time and place of sale before the property was sold. The mortgagee became the purchaser; and it is to restrain the sheriff from putting him in possession of the seventy acres claimed as exempt that the injunction is prayed for. The chancellor denied the injunction, and we affirm his judgment.

1. It has already been ruled by this court that the act of 1874, modifying the Code so as to exclude the exemption right against a debt for purchase money, applies to debts made prior to the passage of the act, as well as to those made subsequently: *Sparger vs. Cumpton*, 54 *Georgia Reports*, 355.. We have not been called upon to review that decision, and we are apprised of no reason for distrusting its soundness.

2. But the point has been made that the act thus construed is unconstitutional as divesting vested rights. Debtors have no vested right not to pay their debts. What they have and what they acquire the state may subject to legal process for the satisfaction of creditors. If the state will furnish the process and allow it to run, nothing that debtors own is beyond its reach. There is no fastness that can afford shelter against the public authority. Exemption of property from levy and sale for the payment of debts, is but a privilege for the time being—mere grace and favor, dependent on the will of the state. An exemption which exists by statute may be reduced or withdrawn by statute; and even constitutional exemptions may be terminated by the same power that created them, the people, expressing their sovereign will by amendment of the organic law. Exemption is but a statutory or

constitutional shield, which being removed, the exposure to process is the same as if it had never been interposed: 13 Wis., 238; Cooley on Con. Lim., 383; 33 *Georgia Reports, Supplement*, 38. So long as the law exists by which exemption is granted and secured, the right to enjoy the exemption exists and should have the same protection from judicial tribunals that is accorded to any other right. But when the law is gone the right is gone.

3. In the case of a mortgage on land it may be questioned whether the right should not be asserted before judgment has passed for foreclosure. The judgment goes against the specific property, and is a mandate to the sheriff to sell it: Code, section 3698; 13 *Georgia Reports*, 389; 18 *Ibid.*, 488; 3 Wall., 334.

4. Be this as it may, it is certainly too late to move in the matter, not only after foreclosure but after the law has been repealed on which the exemption depended. The repeal was in February, 1874, and not until December, 1875, did the mortgagor make any claim to the exemption. Under the provisions of the Code he might have asserted his claim and had the property laid off as soon as he acquired title to the land. There was no compulsion upon him to defer it from 1871 to 1875. He acted voluntarily, and must take the consequences of his procrastination. It is not certain, however, that his situation would have been any better after the act of 1874 was passed, if he had before that time claimed the exemption and had it laid off. Precisely what effect that would have had may be left undetermined.

5. The bill alleges that according to the real contract between the parties, though otherwise reduced to writing, the mortgage debt was not due, and that certain payments were made before the judgment of foreclosure which were not credited. These questions were concluded by the judgment, to say nothing, as to the former, of the rule by which all contemporaneous stipulations are swallowed up in the writing. It does not appear that the notes, or the mortgage given to

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secure them, were written otherwise than as both parties intended they should be written.

6. The bill goes, in part, on the theory that as much of the purchase money has been paid, *some* of the land is paid for in full, and as to that much the debt should not be treated as a debt for purchase money. The principle of apportionment is invoked. An adverse decision on this point has already been made during the present term, in a case which is cited in the head-note.

Judgment affirmed.

JAMES T. THWEATT *et al.*, plaintiffs in error, *vs.* ABRAM GAMMELL *et al.*, defendants in error.

Where an injunction restraining the sale of certain mules was violated, and the answer to the rule was that they were exempted as the property of one of the defendants by the ordinary and sold by his leave, and where both defendants had mortgaged the mules in the same deed to complainants to secure them as the sureties of one of them on an administrator's bond, and the evidence before the chancellor on the question whether one or both defendants owned the mules, was conflicting, and where one of the defendants sold the mules in violation of the injunction, and the evidence shows the complicity of the other therein:

Held, that this court will not control the discretion of the circuit judge in punishing both defendants by commanding them to return the mules or pay into court the purchase money therefor, or be committed for contempt in default thereof.

Injunction. Contempt. Before Judge JAMES JOHNSON. Muscogee Superior Court. November Term, 1874.

Reported in the opinion.

H. L. BENNING; R. J. MOSES, for plaintiffs in error.

PEABODY & BRANNON; L. F. GARRARD, for defendants.

JACKSON, Judge.

Gammell and Stapler brought a bill in equity against the Thweatts, alleging that the said Thweatts had jointly mortgaged to them eighteen mules and two horses, to save them

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harmless as sureties on a temporary bond given by James T. Thweatt as administrator of Owen Thomas; that suit had been brought on that bond by the executors of Thomas, and that they, the sureties, were liable for at least \$2,000 00; that the Thweatts were insolvent, were unable to maintain the mortgaged property and were trying to sell it, and prayed for an injunction and receiver. The injunction was granted, prohibiting the Thweatts from removing the mules and horses beyond the limits of the state, and from selling the same. This injunction was afterwards made perpetual. At a subsequent term of the court Gammell and Stapler filed a petition alleging that the Thweatts had disobeyed the injunction and sold the mules, and praying that they be punished for contempt, and ordered to bring back the mules or pay the purchase money into court. The defendants admitted that they had disposed of several of the mules, but by consent of the other side, and that Robert Thweatt had sold seven that had been exempted to him under the constitution and act of 1868, but it does not appear that he was the head of a family. James T. Thweatt was proved to have said that he would get the mules released the next day, and pocket the money and spend it, and he himself swore that he did not remember saying that he would pocket the money and spend it, but admitted "that he intended to convey the idea that he would sell the mules for the use of himself and the said Robert R., they both thinking that they would have the right to do this under the homestead law, and being goaded on by the conduct of said Gammell and Stapler to insist on all of their legal rights." It was shown that Gammell and Stapler had been forced to pay the judgment against them as sureties of James T. Thweatt, between \$700 and \$800 00 each, and that the seven mules brought \$965 00. Affidavits that the seven mules belonged to Robert, and that they were the joint property of both of the Thweatts, were read *pro* and *con*.

The chancellor directed that the Thweatts pay into court the sum of \$965 00, or bring back the mules, or be commit-



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ted to jail for contempt in case they did not. This action of the chancellor is the error assigned.

This court has repeatedly decided not to interfere with the discretion of the court below in matters pertaining to injunctions except in cases where that discretion was grossly abused. In cases where the chancellor punished for disobedience to his restraining order—indeed to the final injunction he grants—we should be still more reluctant to interfere. It can be no excuse that the chancellor casually remarked in the hearing of defendant that the injunction would not interfere with an application for homestead. The injunction was violated, not by *applying for a homestead* but by *selling the mules*. The case at bar is one that can make no appeal whatever to the judgment of a good man for interference with the rulings of the court. Gammell and Stapler were securities for one of the Thweatts. The other united with his brother in mortgaging to them this property to save them harmless. In a short time they set to work to dispose of the property. James T. says they will do so by exempting it. Robert actually does exempt seven mules and sells them. The injunction is that they shall not be sold. Those exempted may or may not have belonged to Robert. The affidavits were conflicting. The mortgage was joint. James swore that by the exemption they would sell and assert all their legal rights. Robert actually sold. The sale itself was, probably, to say the least, illegal; at all events, it was in the teeth of the injunction. The equity is all with their sureties, the punishment mild, the indemnity pledged to the sureties all gone in one way and another, and the refunding this ill-gotten money inadequate to indemnify them. As far as it goes it should be applied, and if the balance of the money which these sureties have been constrained to pay were within its grasp, equity would rejoice to constrain these defendants to pay to complainants the last cent of their just demands.

Let the judgment be affirmed.

JOHN W. CARSWELL, executor, plaintiff in error, vs. HENRY J. SCHLEY *et al.*, defendants in error.

(This case was argued at the last term and the decision reserved.)

1. By the marriage settlement Mrs. Miller and her two children by Dr. Miller, were tenants in common of the whole property, each with an interest of one-third.
2. At the death of Mrs. Miller her third passed to him, half of it by survivorship, and the other half because he was her heir-at-law.
3. Dr. Miller was entitled to take the profits and labor of the whole property while his wife was in life only. After her death he and his two children by her, were tenants in common in both *corpus* and future profits.
4. In view of the doubtful construction of the marriage settlement, all the defendants in the original bill were proper parties.

Estates. Husband and wife. Administrators and executors. Distribution. Equity. Parties. Before Judge GIBSON. Burke Superior Court. November Adjourned Term, 1874.

Henry J. Schley, in right of his wife, and Baldwin B. Miller, filed their bill against John W. Carswell as executor of Baldwin B. Miller, deceased, Sarah Dowse and husband, Gideon Dowse, and Robert J. Morrison, making, in substance, the following case:

The testator, Baldwin B. Miller, intermarried with Rosina S. Morrison on October 29th, 1827, and complainants, Francis V. Miller, now Schley, and Baldwin B. Miller, were the only issue. At the time of such marriage Mrs. Rosina S. Morrison was a widow with two children, to-wit: the defendants, Sarah Dowse and Robert J. Morrison.

John B. Morrison, the former husband of Rosina S., was possessed of a large estate, real and personal, of the value of \$....., to which there were three heirs-at-law, (said John B. having died intestate,) namely, the said Rosina S. and her two children aforesaid, each of whom took a third at the division. Before marriage the said Rosina S. and said testator, entered into a marriage settlement with James Anderson, trustee, whereby the property of the said Rosina S.,

one-third of the estate of her late husband, was conveyed to said trustee for the uses, trusts and purposes :

“ That is to say, in trust for the said Rosina S. Morrison, until the said intended marriage shall take effect, and from and immediately after the solemnization thereof, then upon trust that the same shall not in anywise be subject or liable to the debts of the said Baldwin B. Miller, her intended husband, but that the said property, together with its increase, shall remain and inure to the proper use, benefit and behoof of the said Rosina S. Morrison and such child or children, being issue of her body, lawfully begotten by the said Baldwin B. Miller, to his, her or their heirs, executors, administrators or assigns forever. Provided, nevertheless, and it is expressly understood and agreed upon between the parties to this instrument, that the *mesne* profits and labor of the said property when divided, both of land and negroes, together with the increase of said negroes, shall and may be used and taken by the said Baldwin B. Miller, for the joint use, benefit and behoof of him, the said Baldwin B. Miller, and the said Rosina S. Morrison, during their joint lives, provided they shall live together, but if they should disagree and separate, then the aforesaid property shall remain with the said James Anderson in trust for the sole use and benefit of the said Rosina S. Morrison. And it is further expressly understood between the parties to this instrument, that if the said Baldwin B. Miller should die before the said Rosina S. Morrison, that the above property, with the increase of the negroes, shall go to and vest in the said Rosina S. Morrison, to her and her heirs, executors, administrators and assigns forever. And it is further understood that if the said Rosina S. Morrison should depart this life, with or without issue, that the aforesaid property shall vest and belong to the said Baldwin B. Miller during his natural life, and at his death one-half of said property shall go and be disposed of in such manner as he may think proper by last will and testament, or otherwise, to his heirs, executors and assigns ; and the remaining half or moiety of said property, the said Rosina S. Morrison shall

have full power and authority to dispose of by last will and testament, but should she make no disposition of it, it shall then vest in and belong to such person or persons as would be her heirs agreeable to the laws of this state."

Miller went into possession of the property embraced in the marriage settlement, and used and enjoyed it with the income and increase thereof, until his death. While he was a man of energy and capacity, he was at the time of said marriage of quite limited means, having little or nothing besides his profession as a doctor of medicine. Yet by the income and increase of said property judiciously used, applied and invested by him, he was, at the date of emancipation, estimated to be worth \$300,000 00 or other large sum. But by the results of the war his estate was reduced, perhaps to the value of \$150,000 00, all or most of which was increase of the property formerly of his said wife, now the property of complainants, which they claim, allowing that \$1,000 00 may have been the result of his own labor and practice. The annual rental of the lands was worth the sum of \$....., and the annual hire of the negroes, \$....., to say nothing of the productiveness of the land, and the increase of the negroes, and other large profits accruing from said property.

Mrs. Rosina S. Miller, formerly Morrison, died September 19th, 1851. Her husband, the testator, administered on her estate. Subsequently he intermarried with Cornelia E. Polhill. He died on the 24th February, 1873, testate. By his last will and testament, (which was duly probated and admitted to record,) he "treated the whole property bequeathed by him as his own property." After some specific bequests, he devised the residue of his estate to his last wife and children. To his son, B. B. Miller, he gave the interest on \$1,000 00, assigning as a reason therefor that he had made "sufficient provision" for him "by deed," and stating as a reason why he devised nothing to Mrs. Frances V. Schley, the other complainant, that he had "already made ample provision" for her "by deed of trust," in which he had "given

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her a portion greater than will fall to the share respectively" of his children by his last wife.

Complainants claim that by the terms of said marriage settlement they took a vested fee simple in the property thereby conveyed, and its increase, subject to the use of the rents, issues and profits thereof by the said Miller, for the mutual benefit of himself and said wife during their joint lives, with a proviso that in the event of the death of his said wife, he surviving, he still to have the use of said property for life. Now that the life estate of said Miller is terminated, they are entitled to be put in possession of the property in the possession of his executor, of the value of \$40,000 00.

John W. Carswell is executor of B. B. Miller, and they have demanded of him their property, also an account, and he refuses to comply with their request. He sometimes pretends that the whole estate, by the terms of said marriage settlement, vested in his testator upon the death of said Rosina S.; whereas complainants charge the contrary, and say that the clear intent of said instrument was to give the fee, in the event of child or children born of said marriage, to said child or children, reserving only a life estate, to be jointly enjoyed so long as both should live and live together, and in the event of her death before her husband, then for his life. At other times he pretends that, at least by the terms thereof, said instrument gives to said decedent one-half of said estate; whereas complainants charge the contrary, for the reasons above assigned, and state that if said Miller was entitled to any right of property at all in said trust estate, (which they deny,) it was only to one-half of the rents, issues and profits derived from the *corpus* of the estate, and which had accrued at the time when it came into his hands, together with the increase and profits of said rents, issues and profits, turned over at the time with the *corpus* of the estate. Again he pretends that there are other claimants for a part of the property, namely: Robert J. Morrison and Gideon Dowse, in right of his wife, Sarah Dowse, formerly Sarah Morrison, and that they insist that they are entitled with the Miller children to

an equal participation in said trust property. But complainants say that if said last named claimants are entitled to any part whatever of said estate, (which they deny,) it would only be an eighth each in the one-half of the aforesaid rents, issues and profits (and their increase) so received by Miller with the *corpus* of the estate, when he went into possession under said marriage articles.

The bill then prays for an account of said property, and that the defendant, John W. Carswell, executor, may show what part of the estate now in his hands as such executor, was the original property of the said Rosina S., and what part of said estate is the direct increase or profits thereof, and either turn over the same or pay complainants its value in money; and that the said R. J. Morrison and Gideon Dowse and wife be made parties defendants and their rights adjudicated in this proceeding; also, for the writ of subpoena.

To this bill the defendant, Carswell, as executor of Miller, filed a demurrer on the following grounds:

1st. There is no privity between himself and said co-defendants, nor do complainants show by their bill such a case as entitles them to proceed against this defendant and the said Morrison and Dowse and wife as co-defendants.

2d. There is no equity in said bill, and the complainants are not entitled to the relief thereby prayed, or any part of such relief.

3d. If they are entitled to any relief whatever, they have a complete and adequate remedy at law.

Robert J. Morrison and Mrs. Dowse filed an answer in the nature of a cross-bill, admitting the facts alleged, but denying that by the terms of said marriage contract complainants have any greater interest in the property therein settled upon their mother than these defendants. On the contrary, they charge that said property, and its increase, was settled upon their said mother during coverture with Miller, and after her death the use and enjoyment thereof was given to said Miller for life, with power to dispose of one-half by will at his death; that as to the other half the power was given to their said mother to

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dispose of that by will at her death; but the operation and effect of her will, should she make one, was to be postponed until the death of Miller, to whom said instrument conveyed the use and enjoyment of the whole property for life in the event of his surviving their said mother, which, in fact, happened. They state that their said mother died intestate, and they charge that Miller died without executing the power conferred on him by said marriage contract of disposing of one-half of said property by will, or of any part of the same, and that, therefore, by the terms of said contract the entire property and its increase passed to the persons who, at the time of Miller's death, were the heirs of their said mother, and they aver that respondents and complainants were the only heirs. Complainants have received a large part of said property from their said father, to-wit: each a plantation and much valuable personalty, whereas respondents have received nothing.

They pray that complainants may discover and account for what they have so received, and that Carswell, as executor, may be compelled to account to complainants and respondents for all the property embraced in said marriage contract, and its increase, and that complainants may be compelled to bring their said advancements into hotchpot and account for them in any division that may be decreed between them and respondents. Discovery is fully prayed against complainants, but waived as to Carswell, executor. They pray a decree settling all the equities between the parties, and for general relief.

Carswell, as executor of Miller, filed a general demurrer to said cross-bill.

Both demurrers were overruled, and Carswell, executor, excepted.

JOHN J. JONES; A. M. RODGERS, for plaintiff in error.

S. A. CORKER; W. W. MONTGOMERY; JAMES S. HOOK;
PERRY & BERRIEN; E. F. LAWSON, for defendants.

BLECKLEY, Judge.

The true intention of the parties is to be sought for. That is the end of all construction.

The children of the former marriage were already provided for. Each of them had a share of the Morrison estate equal to that which came to Mrs. Morrison, the mother. In anticipation of a second marriage, she wished to provide for the possible offspring of that marriage, securing to herself, in the *corpus*, mere equality with each future child. The income which might accrue during the joint lives of herself and her intended husband she wished to go to the latter for their mutual enjoyment. In the event, however, of a separation, she desired it to be exclusively her own. If she survived him, then the whole *corpus* was to be hers, unless there were children of the marriage to share it; in which case, so much was to be hers as had not vested in them under the previous provisions of the instrument. If without any children of the marriage he survived her, the whole, or if with such children, her due share, was to vest in him during his life; half of it subject to disposition or descent, (equivalent to a vesting of the fee,) and the other half subject to her own disposition by will, and if not so disposed of, to go where the laws of the state might cast it at her death. We think this the most probable scheme of the marriage settlement; and it is one which the words will bear out better than any other that we have heard suggested or been able to surmise.

1. The first trust declared is unimportant, being merely for the benefit of Mrs. Rosina S. Morrison until her intended marriage with Miller. The next, after putting a negative upon liability for his debts, is, "that the said property, together with its increase, shall remain and inure to the proper use, benefit and behoof of the said Rosina S. Morrison and such child or children, being issue of her body, lawfully begotten by the said Baldwin B. Miller, to his, her or their heirs, executors, administrators or assigns, forever." Out of these words arise an equitable estate that must be referred to one of

three classes—an estate tail, an estate for life, with remainder to future children, or an estate in fee, subject, on the birth of children, to become an estate in joint tenancy or in common, the mother and children being thenceforth co-tenants in fee. It is not an estate tail, for the terms, “such child or children, being issue of her body, lawfully begotten by the said Baldwin B. Miller,” are equivalent, in this instrument, to “such child or children as may be of her lawfully begotten by said Baldwin B. Miller;” the word “issue” being used in the sense of children proper, and not in the sense of a line or succession of descendants: 25 *Georgia Reports*, 305. It is not an estate for life in Mrs. Miller, with remainder to children; because (not to speak of any other reason,) subsequent provisions of the instrument show conclusively that her estate was to endure beyond her own life, one-half going to Miller, substantially in fee, on condition of his survivorship, and the other half being subject to a life estate in him, and to final testamentary disposition by her. This same fact also comes in aid of the view above presented against the theory of an estate tail; as, by these later provisions, Mrs. Miller’s estate was to outlive her and go in the direction indicated whether she left issue or not, which is inconsistent with a purpose that the issue should take by way of entail. Two children were born of the marriage, and still survive, each of whom became a joint tenant or tenant in common with the mother, in the fee of the whole *corpus*, including the increase. For children not in *esse* at the execution of the conveyance to take thus under a marriage settlement, a trustee being interposed to receive and hold the legal estate, is no novelty. Even under ordinary trust deeds they can take: 52 *Georgia Reports*, 425; *Tucker vs. Lee*, this term.

Since the constitution of 1777, joint tenancy is resolvable virtually into tenancy in common: 23 *Georgia Reports*, 325. Thus far the language of the settlement is free from obscurity or real difficulty. It will abide severe scrutiny, and bear a rigid application of the canons of construction. It is, moreover, in strict accord with a not infrequent or unreasonable

intention of the parties to such instrument, the setting apart of an equal share of the wife's fortune to herself and each child of the contemplated marriage. With this much of firm ground to stand upon, we cannot escape the conviction that the interest of these children was not intended to be cut down or in any way modified by later provisions of the settlement. That the two children became entitled and remained entitled to two-thirds of the *corpus*, we must believe; and what is apparently to the contrary in the latter provisions, should, if possible, be reconciled with, and not be permitted to destroy, an antecedent provision which, besides the advantage of antecedence, has the advantage of perfect clearness. We think reconciliation possible. The passage to be now reconciled is as follows: "And it is further expressly understood between the parties to this instrument, that if the said Baldwin B. Miller should die before the said Rosina S. Morrison, that the above property, with the increase of the negroes, shall go to, and vest in, the said Rosina S. Morrison, to her and her heirs, executors, administrators and assigns forever. And it is further understood that if the said Rosina S. Morrison should depart this life, with or without issue, that the aforesaid property shall vest and belong to the said Baldwin B. Miller, during his natural life, and at his death one-half of said property shall go and be disposed of in such manner as he may think proper by last will and testament, or otherwise, to his heirs, executors and assigns; and the remaining half or moiety of said property, the said Rosina S. Morrison shall and have full power and authority to dispose of by last will and testament, but should she make no disposition of it, it shall then vest in, and belong to, such person or persons as would be her heirs agreeable to the laws of the state." It is true that the words "above property" in the first of these two sentences, and the words "aforesaid property" and "said property" in the second, seem to refer to the whole *corpus*; and it is true, also, that there is an express declaration that Miller was to take, on his wife's death, whether she died "with or without issue." If such terms as "subject to the foregoing

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provisions in favor of any child or children of the marriage" had been inserted in the appropriate position to qualify these clauses, all ambiguity would have disappeared. We think they are to be implied. The true construction, therefore, is, that the whole *corpus* was embraced in the words "above property," "aforesaid property," and "said property" with a tacit qualification, that in case children were born, the words were to be narrowed so as not to infringe upon their rights. In this flexible or reduced sense, the words would mean, not the whole *corpus* absolutely, but the whole, if Mrs. Miller remained sole owner; or her share, if children were born to share with her. She dying first without issue, Miller would take all; and so, too, if she died with issue, unless such issue were children of the marriage, in which event he would take all of her share only. Any other interpretation of these clauses would leave the children nothing, and render the provision in their behalf utterly nugatory. Another somewhat pertinent passage is left to be reconciled under the third head, when we reach the subject of income.

2. Having ascertained that Mrs. Miller's interest in the *corpus* was reduced to one-third, what became of it upon her death? Under the language last quoted from the marriage settlement, it passed to Miller for his life, he having survived her; and as to half of it, his life estate was enlarged substantially into a fee, whether he exercised the power of disposition or not; for his failure to exercise the power was to be attended with no consequence except the succession of "his heirs, executors and assigns." As to the other half, Mrs. Miller had a power of disposition which she forbore to exercise; and, by the terms of the settlement, that half was, at her death, to "vest in, and belong to, such person or persons as would be her heirs agreeable to the laws of this state." She died in 1851, and at that time a wife had, by the laws of this state, no heir but her husband: 4 *Georgia Reports*, 377, 541; 23 *Ibid.*, 142; 25 *Ibid.*, 480, 622; 29 *Ibid.*, 733. The result is that Miller acquired the whole of her third of the property—half by survivorship and half as her heir-at-law.

3. The provisions of the settlement touching income are as follows: "Provided, nevertheless, and it is expressly understood and agreed upon between the parties to this instrument, that the *meane* profits and labor of the said property, when divided, both of land and negroes, together with the increase of said negroes, shall and may be used and taken by the said Baldwin B. Miller, for the joint use, benefit and behoof of him, the said Baldwin B. Miller, and the said Rosina S. Morrison, during their joint lives, provided they shall live together; but if they should disagree and separate, then the aforesaid property shall remain with the said James Anderson, in trust for the sole use and benefit of the said Rosina S. Morrison." The terms "when divided," have reference to a division of the Morrison estate among the distributees of that estate, which seems not to have taken place anterior to the execution of this instrument. The terms "together with the increase of said negroes," are used in a way to suggest a possible doubt whether the increase themselves, or only their labor, passed with the *meane* profits; but we think the latter was the real intention. It is not at all probable that a woman, herself a mother, nor indeed any other person, would, in this wholesale way, fasten a different title upon negro children not yet born, from that by which the mothers bearing them were to be held. The word "increase," wherever used in the settlement, means natural increase; and such increase, in the case of slaves, would go to enlarge the *corpus*; and we think it was not the intention of the parties here to vary that general rule. The terms "during their joint lives," are also open to some little question. As here used, do they limit the estate in *meane* profits and labor; or do they simply define a period of time—the time within which the profits and labor to be appropriated are to accrue? We think they fulfil the latter office, and that it was the purpose of the instrument to dispose forever of the income accruing during the joint lives of the consorts; and not merely to create an estate for their joint lives in what accrued during their joint lives, thus doubling the application of the terms. We reach now the final question

under this head: To whom is this income, that is, the *mesne* profits and labor, disposed of? It is to be "used and taken" by Miller "for the joint use, benefit and behoof" of himself and Mrs. Miller, "provied they shall live together; but if they should disagree and separate, then the aforesaid property shall remain with the said James Anderson in trust for the sole use and benefit of the said Rosina S. Morrison," (Mrs. Miller.) Miller is to "use and take" it. Perhaps the only right of Mrs. Miller, (unless in case of separation,) was to have out of it what she needed for her support and comfort as his wife. But if it were otherwise; if they were strictly tenants in common, there is no disposition of her share of the accumulation from it; so that upon her death, he became entitled thereto as husband or heir-at-law. It is not quite certain that his marital rights would not attach upon such accumulations pending her life, for it will be observed that he, and not the trustee, was to "take" the income. It was not saddled with the trust proper, as was the *corpus*; and the use declared was not a separate use for the wife, but a joint use for both. In the event of separation, however, the trust proper did fasten on the income; and this brings us to a consideration of the object and effect of the terms last above quoted: "but if they should disagree and separate, then the aforesaid property shall remain with the said James Anderson, in trust for the sole use and benefit of the said Rosina S. Morrison." We think this clause was inserted only for the purpose of controlling income, if separation should occur. The words "aforesaid property" mean the *corpus*; the possession of which was, doubtless, intended to be in Miller up to a separation, but no longer. Whenever a separation took place, if at all, the trustee was to assume possession, and hold for the sole benefit of Mrs. Miller until some other provision took effect in consequence of the death of one of the consorts. In this manner, Mrs. Miller would be sole recipient of the income during the balance of their joint lives. It will be noticed that this clause is not in itself a complete sentence, but is part of that touching income. It need not be construed to vary any provision as to

ownership of the *corpus*; and it is thus that we reconcile it with what has been advanced on that subject under the first head. It relates to income, in the contingency mentioned, and to the means of securing it, and to nothing else. While we think that Miller became absolute owner of all unconsu-
med income that accrued up to Mrs. Miller's death, we discover no ground for extending his right to more than one-third of the income that accrued afterwards. From the time of her death, he was a tenant in common with the two children of the marriage, in both *corpus* and future profits.

4. Although it results from what has been said, that, in our opinion, the two Morrison children have no right to any of the property in controversy, still, we are pretty sure that under the circumstances, none of the parties to the original bill were improper parties. The construction of a very peculiar and dubious instrument was to take place, and in the *judgment of construction* all these parties had an interest. It was right to afford all an opportunity of being heard, and it was economical to concentrate the hearing in a single suit. If any of the defendants had wanted to shun controversy, the resource of disclaimer was open to them; and even if they had not defended that far, but had made default, the chancellor could and would have protected against cost such as proved to be legally disinterested in the property, and who asserted no interest. The question of cost is subject to discretion.

Without concurring with the judge below in all his reasons for retaining the original bill, we affirm his judgment overruling the demurrer to the same; and reverse his judgment as to the cross-bill. Let the cross-bill be dismissed.

ANDERSON WYNNE, JR., plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

1. On an indictment for murder the court should not give the law of voluntary manslaughter in charge to the jury, if there be no evidence which would authorize the jury to consider that lower grade of homicide; but if

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there be sufficient evidence to create a doubt, however slight, upon the point of whether the offense be murder or voluntary manslaughter, and if one of the defenses urged by defendant's counsel be, that the facts make a case of voluntary manslaughter, and if the attention of the court be called by counsel thereto, the court should instruct the jury upon the law of voluntary manslaughter as well as of murder; otherwise the jury would be deprived of their privilege to pass upon the facts, and the defendant would be denied his right to have them try every issue of fact.

2. It is not error to call the jury's attention to physical facts, such as the appearance of the pistol and cartridges used in the difficulty by the deceased, as circumstances which they may invoke to settle the conflict in the testimony of witnesses, especially where the court says distinctly in connection with this part of his charge that he neither expresses nor intimates any opinion as to the effect thereof.
3. The pistol, though fired off after the rencontre is over, may go to the jury for their inspection, and its condition as found at the close of the fight may be described by witnesses who saw it then and before it was altered by firing; but no experiment by firing, or otherwise, if made without defendant's consent, and after the homicide, should be admitted as evidence. It might result in the improper manufacture of testimony after the close of the affray.
4. Witnesses may testify about the appearance of the pistol and cartridges at the close of the fight, marks of indentation or the want of such marks, as indicating whether other barrels had been snapped or not, and all other facts connected with the pistol and cartridges unaltered from their condition at the close of the fight; and upon further testifying that they are familiar with such weapons and their use and practice, they may give their opinions upon the question, whether the appearance of the pistol, cartridges, marks and indentations, or their absence, indicate that other, and how many, barrels had been snapped; the jury, of course, being free to form their own opinion and draw their own conclusion from all the testimony.
5. The flight of the accused, where and when arrested, whether he resisted or not, how he was armed, and all the circumstances attending his arrest, are admissible to be considered by the jury for what they are worth.

Criminal law. Charge of court. Evidence. Before Judge POTTLE. Hancock Superior Court. October Adjourned Term, 1875.

Reported in the opinion.

GEORGE F. PIERCE; J. T. JORDAN, for plaintiff in error.

SAMUEL LUMPKIN, solicitor-general; SEABORN REESE;
CHARLES W. DUBOSE, for the state.

JACKSON, Judge.

The defendant was indicted for murder in the county of Hancock. A colored man himself, he was charged with the murder of another man of color by the name of John Bruce. The homicide was perpetrated with a long pocket-knife. The fatal stab severed two of his ribs, cut his lungs in two, and entered his heart, causing death in from two to five minutes. The defendant was found guilty, and moved the court for a new trial on the grounds disclosed in the record; the court overruled the motion on all the grounds, and error is assigned here on each of them.

1. The first ground is that the court refused, as requested, to charge the law of voluntary manslaughter, and to read the sections of the Code bearing thereon. Taking the request altogether, we think it was properly refused, because the evidence hardly justified the language of the charge requested, that deceased "*interfered*" in the heated and angry quarrel which the accused had with Cornelius Brown and others. No portion of the evidence will justify the impression which would probably have been made that deceased interfered angrily or improperly in a heated quarrel or participated in any quarrel. All the testimony shows that he interposed for peace only. Therefore we think that this request, considered altogether, is not sound law applicable to the facts proven on the trial. But the important question is, not whether the court erred in his refusal to charge the precise language requested, but whether he should, under the facts here, have given in charge the law of voluntary manslaughter in his own language or in the language of the Code. His attention was called specifically to that law, and he said to the jury in his charge that he declined to give them in charge the law of voluntary manslaughter, because the case which the facts made was either murder or justifiable homicide, thus excluding from their consideration the whole law of voluntary manslaughter, and not permitting them to consider that grade of homicide at all. If the court below was right that under *no view* of the

facts proven could there possibly have been a verdict of guilty of voluntary manslaughter, then he should not have given the law in respect thereto in charge; but if the facts proven created a *doubt, however slight*, that the case might be graded below murder, then the court should have given the jury the opportunity to pass upon that doubt. If he had been requested to charge the law of involuntary manslaughter, he should have declined to charge that law; because it is impossible that the accused could have been guilty of that offense under the facts proven in this case. Or in a case where the question is one of insanity alone, everybody admitting that if the accused were sane the crime would be murder, in such a case he should decline to charge the law of voluntary manslaughter; but in a doubtful case, though the doubt be slight, the court must not solve that doubt arising on the facts; for if he does, and if this court affirm his judgment, that court and this will decide *doubtful facts*, and the right of trial by jury will be practically gone. This general subject has been often before this court, and we think that every opinion and judgment pronounced upon all the phases in which it has been presented may be harmonized upon this view: that where it is clear as noon-day that the accused must be guilty of murder or not guilty at all, the court may decline to incumber the case with immaterial and irrelevant law; but if there be cloud or mist, or spots upon the sun's disk, and the defense is based in part upon the obscurity of this light, and the attention of the court is called thereto by counsel, then the court must permit the jury to look at the whole law and all the facts, and discover for themselves the light of the truth as it shines upon the entire case. In the language of the present chief justice, in *Washington vs. The State*, 36 *Georgia Reports*, 222, "if there is *no evidence* which would authorize the jury to find a verdict for any grade of homicide less than murder, then such charge (on voluntary manslaughter) ought not to be given;" and in the language of the head-note, in *Crawford vs. The State*, 12 *Georgia Reports*, 142, "where the defendant is put on trial for murder and there is *any doubt* as to the grade of homi-

cide of which he is guilty, it is the duty of the court clearly and distinctly to instruct the jury as to the law, defining the several grades of homicide, and then leave it to the jury to find from the evidence of what particular grade he is guilty."

The decisions of this court on this subject will be found collated in the late work of Judge HOPKINS, on our penal laws, paragraph 850, *et seq.*; and the question is discussed in many forms in the cases there cited. All the cases, we think, certainly nearly all of them, may be reconciled with each other and harmonize on the line above indicated.

The question in this case, then, is this: might not the jury, upon the facts proven, have found the accused guilty of voluntary manslaughter? Should they not have been permitted to consider the testimony in the light of that law? Is there not some doubt arising upon these facts that the accused, whilst not justifiable, may have acted upon a sudden heat of passion and without malice? Is there not some evidence, which, if believed by them, would have created such a doubt that they should have been permitted to solve it? We think that there is, not that we mean to say that the facts make him guilty of voluntary manslaughter; on that we express no opinion, as the case will be tried again, and the jury should be left free to find for themselves on the facts; all that we mean to say is, that the facts make doubts which they should have the opportunity of considering and solving. It was night, everything in more or less of darkness; the evidence was conflicting; the men had never had a previous quarrel; there was some testimony that blows were stricken, or that the deceased shoved the accused; the pistol was fired either before or immediately after the fatal stab with the knife; it might have been drawn, if not snapped or fired, before the stab; the accused might have seen it before it was snapped or fired at him, and therefore before he was assaulted, and have been too quick to be entirely justified, and yet in danger enough to use his knife in a sudden heat of passion; all these facts and contradictions make such a *melee* of confusion and doubt as to make it proper for the court to instruct the jury

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upon the law of murder, of voluntary manslaughter, and of justifiable homicide. We are all of opinion that had the law of voluntary manslaughter been given in charge, and had the jury found a verdict of murder, the finding should not have been disturbed; but we all also think that the court should not have withheld from the jury the consideration of the inferior grade of homicide.

2. The second ground for the motion is that the court erred in calling the attention of the jury to physical facts connected with the pistol and cartridges, as bearing upon the conflict of testimony. We think the charge fair and impartial throughout; and as he qualified his reference to these physical facts by declining to express or intimate any opinion thereon, we see no error in this part of the charge.

3. The third ground is that the court erred in allowing the pistol and cartridges to be placed before the jury for their inspection, over defendant's objections. We think that the court should have permitted the jury to have and inspect the pistol, and that then the witnesses should have been questioned as to its condition at the end of the rencontre. It had been fired off after the fight; we do not think that any new testimony should have been manufactured by firing off the pistol or otherwise changing its condition from what it was at the close of the fight, without defendant's consent; but we can see no objection to the pistol being exhibited to the jury and inspected by them, with testimony as to its appearance, how it was fired, the indentations or marks upon the cartridges indicating whether any, or how many barrels had been snapped, and everything about it as it was when the difficulty closed.

4. The fourth ground is that the court allowed a witness to express his opinion whether the cartridges had been punctured by snapping them before they were fired. We think that any witness, after stating the appearance of the pistol and cartridges with indentations or the absence of indentations, and that he was familiar with the use of the weapon from having practiced frequently with it, should have been permitted to express such an opinion, with the right of the jury, of

course, to form and find their own opinion upon all the evidence.

5. The last ground of the motion for a new trial is that the court erred in allowing the fact to be proven that when arrested in Wilkes county, a week after the difficulty, defendant had on his person and in his buggy, the knife with which the fatal blow was probably given, with stains of blood upon it, a double-barrel gun, and a five-shooter pistol. The flight of the accused, the time when and the place where arrested, the manner of the arrest, how he was armed, and whether he resisted, and all the circumstances connected with the arrest, we consider proper evidence to be submitted to the jury to be weighed by them for what they are worth. We reverse the judgment, and direct a new trial on the ground that the court erred in not instructing the jury upon the law of voluntary manslaughter, and in not permitting them to consider the facts in the light of that grade of the law of homicide.

Judgment reversed.

ASHER AYERS, plaintiff in error *vs.* DENNIS DALY, defendant in error.

(JACKSON, Judge, having been of counsel in this case, did not preside.)

1. A bill for account cannot be turned by amendment into an action for breach of warranty as to the quality of goods sold by the defendant to the plaintiff in an accounting which took place; more especially, if at the time of making the amendment, a separate action on the warranty would have been barred by the statute of limitations.
2. Where the bill touching a Confederate transaction alleges no conversion of any part of the goods delivered to the defendant for sale and no failure to return goods unsold, but claims the proceeds of sales made, it is error to decree for the value of the goods in United States currency at the time when they ought to have been accounted for, instead of the value of the proceeds of a fair sale when the goods were or ought to have been sold.
3. The bill cannot be amended before the master.

Equity. Amendment. Statute of limitations. Damages.
Before Judge HILL. Bibb Superior Court. April Term, 1875.

Ayers vs. Daly.

During October, 1864, and February, 1865, Daly deposited with Ayres certain goods which the latter was to sell on commission. They yielded over \$12,000 00 in Confederate money. While some of this money was in hand, Ayres agreed with Daly to invest the same in cotton under shelter. This was a gratuitous undertaking for the accommodation of the bailor, and without compensation to the bailee. About the month of May, 1865, the parties had a settlement. Ayres rendered an account of sales, and turned over to Daly warehouse receipts for twenty-nine bales of cotton, which, at seventy-five cents a pound, would equal the amount which was to have been invested. Certain of the goods remaining unsold were returned, and the settlement was treated by the parties as full and complete.

No attention was given to the cotton until the fall of 1865, when much of it was found to have been damaged and wasted, and only part of it under shelter. Six bales had never been under shelter, but lay all the time in the warehouse yard, which fact appears to have been previously known directly to neither party. Shortly after ascertaining the condition of the cotton, Daly brought suit against Ayres for reclamation on account of its bad order and waste. This action was never tried, but is still pending.

In 1869 Daly filed his bill praying that Ayers might be compelled to account for the amount received by him for the sale of the goods bailed, and to pay what should be found equitably due on account of said sales; also that the receipt given by the bailor on the settlement might be delivered up and canceled, and for general relief. The bill charged the bailment of the goods; that the goods were sold; that Ayers represented he had invested a portion of the proceeds in cotton; the settlement as to the same, the delivery of the warehouse receipts, the bad condition of the cotton, etc.

The case was referred by the court to a master. In the course of the proceedings before him, in January, 1875, complainant amended his bill, charging that when the settlement was made he supposed that his money had been invested in

the cotton covered by the receipts, but in fact it had not been. That the defendant had mingled that money with his own, and therewith bought several lots and varieties of cotton indiscriminately in his own name; that had he invested complainant's money specifically in cotton, as he agreed to do, and might have done, and taken reasonable care of the cotton, complainant would have realized therefor \$5,000 00, or other large sum; and that by his failure so to do complainant had been injured and damaged in the aforesaid amount. The amendment prayed an account for the twenty-nine bales of cotton called for in the receipts or the full value thereof, and for general relief in that behalf.

The defendant demurred, before the master, to the bill as amended, on the following grounds: 1st. for want of equity; 2d. because of a complete remedy at law; 3d. because the matter of the amendment was a distinct cause of action; 4th. because said matter had not accrued within four years, and was barred by the statute of limitations; 5th. because the bill was not amendable, the case being before a master.

The master allowed the amendment, overruled the demurrer, heard evidence and made his report, which was to the effect that Ayers had fully accounted for all of the goods of Daly which had come into his possession except thirty-one and three-fourths gallons of peach brandy, which he found to have been worth \$5 00 per gallon at the date of the settlement before alluded to. He therefore reported that Daly should recover of Ayers \$158 75. To this report both parties excepted; Ayers, because the master considered the amendment filed while the case was before him and heard evidence thereunder; because he overruled his demurrer to the bill, and because the finding as to the brandy was contrary to the evidence; Daly, mainly because the master had found that Ayers was neither liable for the twenty-nine bales of cotton before alluded to, nor for the six bales thereof which had never been under shelter.

The questions arising upon the exceptions were submitted to the chancellor without the intervention of a jury. He

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sustained the report except in two particulars, to-wit: 1st. He allowed interest in favor of Daly on the value of the afore-said peach brandy from the date of the settlement. 2d. He found that Ayers was liable for the difference in value between the six bales of cotton in their actual condition, and in the condition represented in the cotton receipts, with interest from the date of the settlement. This difference he placed at fifteen cents per pound. It was decreed accordingly. To this judgment Ayers excepted.

NISBET, BACON & HINES; R. F. LYON, for plaintiff in error.

LANIER & ANDERSON, HILL & HARRIS, for defendant.

BLECKLEY, Judge.

Bailment of goods to be sold, reception of the proceeds, and failure to pay them over, will constitute a complete cause of action. Gross negligence in executing a separate agreement to invest the proceeds of sale in cotton, and damage therefrom, will constitute another complete cause of action. Warranty, express or implied, as to the quality of cotton turned over in place of money retained or misappropriated, and breach of such warranty, will constitute another complete cause of action. The whole record, taken together, discloses two bailments, and an intermediate agreement to invest in cotton the Confederate money which had already been derived from the sale of goods embraced in the first bailment. Thus far there is certainty. Another contract possible to be inferred from the facts, is one of implied warranty as to the cotton. This contract, if one at all, dates in or about May, 1865, and arises out of the accounting which then took place. The uncertainty which environs it is due chiefly to the doubtful manner in which Ayers executed his undertaking to invest in cotton. If, instead of investing Daly's money in this cotton, the cotton was his own, and he, for that reason, is to be regarded as selling it to Daly when he turned over to him the warehouse receipts, then there may be no obstacle to rais-

ing an implied warranty as to quality. On the other hand, if Daly's money was invested in this cotton, there is no semblance of warranty, whatever room there may be for an action founded on gross negligence in executing the agreement to invest. The original bill was grounded on bailment, and was in the nature of an action for money had and received. It went for the proceeds of goods sold, and alleged that the goods *were* sold. It prayed for an account of the amount received from sales, and for payment of such amount as might be found equitably due on account of said sales. It repudiated the accounting which had taken place, and prayed for the cancellation of the receipt which the complainant had given on that occasion. It stood upon the complainant's right to the money which had accrued from the sale of his goods. It made no charge that any of the goods were unsold, or that any of them had been converted by the defendant, or that any demand had been made for their return, or that there was any default in not returning them. It made no charge that the defendant had agreed to invest the proceeds in cotton, or that he had made any breach of such agreement, or that he was under any obligation to invest the money or to exercise any care or diligence touching the investment of it, or touching the protection or preservation of any cotton. The defendant's agreement to invest came out in the amendment and in the evidence, but was not alleged in the original bill. The sole contract set up by the latter was the contract of bailment; and the breach of it alleged was in failing to account for and pay over the proceeds of sale. It was averred that the goods were sold whilst the complainant was absent in the military service; and that averment, with the dates of bailment and other facts in the case, show that it was not expected that other than Confederate money would be received for the goods; and it is not alleged or proven that any other was received. The original bill, properly construed, was simply a suit to avoid the prior receipt, and to recover the money which the goods produced, or its value, offering to allow credit for commissions, and for the amount actually realized from a sale of the cotton.

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1. Thus construing the bill, we think it was not amendable so as to turn it, in whole or in part, into an action for breach of warranty as to the quality of any part of the cotton turned over in the accounting which had taken place between the parties. That accounting was repudiated by the complainant and he fell back upon his original right. He sued for the consideration which he gave for the cotton, and he was not entitled to reclaim that and at the same time contend for the difference between the value of the cotton as it was and the value of it as it ought to have been. Inasmuch as he retained the cotton, treating it as sold to him by the defendant, its value as it was would, on that theory, be the measure of the credit for it to which the defendant would be entitled. And to limit the credit thus is consistent with the bill; whereas, to decree affirmatively for the difference between the value of the cotton as it was and its value in a better condition, would be appropriate to a wholly different action. The chancellor, acting on the idea of implied warranty, modified the master's report, and rendered such a decree as to six bales of the cotton. Such a recovery could rest, perhaps, in a court of law, either on a breach of warranty or on a failure to exercise due care and diligence in executing the agreement to invest—on the former, if the cotton was not bought with complainant's funds, and on the latter if it was. But neither warranty nor agency to invest is averred in the original bill; and the breach as to either would be a new and distinct cause of action from that which is averred therein. Moreover, the amendment was not filed until an action on the supposed warranty, if then first brought, would have been too late; and the bar of the statute would probably have applied equally to an action for the omission of diligence in executing the agency to invest.

2. The exception by the defendant to the master's report, as to the item of brandy, ought to have been sustained. The brandy was valued, not as an article sold for Confederate money while the complainant was absent in the military service, but as if it had remained on hand at the time of settle-

ment in May, 1865, and was then worth so much in United States currency. The bill contained no allegation, and there was properly no evidence, warranting it to be thus dealt with. When a party sues for one grievance he must not recover for another.

3. No authority has been produced to us, and we know of none, for the novel and extraordinary practice of amending a bill before the master. On principle, we are clear that the master has nothing to do with receiving amendments. He is to act on such pleadings only as belonged to the case when it was referred to him. The judge orders the reference because the pleadings, as they stand, are ready for the master's work, and make a case needing his services. If the case could undergo changes before the master himself, by amendments submitted to him, the very reasons which induced the reference might be amended away, and the master's functions be made wholly useless. Each amendment to the bill, if important enough to vary materially the complainant's case, reopens the bill to demurrer. After such an amendment the judge, if aware of it, might not want the master's services. It seems to us wholly inadmissible for the latter to proceed as he did in this case, taking cognizance of an amendment, hearing it on demurrer, overruling the demurrer, and taking evidence touching the new facts alleged. This is turning the master's office into a court of equity, and for the time being, raising the master to the office of judge. It may be that under our broad statutory provisions the pleadings are amendable without special leave, while the case stands on a reference, but if so, the amendments are to be filed, not with the master, but in the clerk's office; and for them to reach the master some order of the court or of the judge would be necessary. In the absence of such an order, the master should proceed without noticing them, dealing with the case as it existed when it was referred.

Judgment reversed.

AUGUSTUS H. LEE, executor, plaintiff in error, vs. FORTUNE
N. CHISOLM et al., defendants in error.

1. When this case was here before it was ruled that the following items of testator's will—"I loan to my wife during her natural life \$5,000 00; also that my executors purchase for my wife a negro woman or girl, such as she may select, the same to be loaned to her her lifetime, the same to be purchased out of the proceeds of my property." "It is my will and desire that at the death of my wife the money loaned her, and the negro to be purchased by my executors, be sold, and equally divided amongst all my children and my grand-daughter, Elderenda Brown" * * *—created a life estate in the wife with remainder to the children and grand-daughter, and that "it was the duty of the executor so to execute the will as to effect that intention by investing the money, paying the widow the interest thereof during her life, and at her death to divide it equally among the children and grand-daughter, as directed by testator's will." This ruling was in this case and between these parties, and as far as it goes, is *res adjudicata*.
2. A decree in favor of the widow against the executor on a bill brought by her and answered by him, in which he sets up no defense in behalf of the remaindermen, but admits that the *corpus* is due the widow under the will, and defends solely on the ground that he has not enough assets of the estate wherewith to pay her, is no protection to the executor against the claim of the remaindermen for whatever *corpus* of this estate came into his hands in available assets. It was his duty to make these remaindermen parties by cross-bill, or by his answer in the nature of a cross-bill, or at least to have defended the widow's suit by setting up their right in remainder to the *corpus*, and having the will construed and their rights adjudicated; much less will he be so protected when his whole defense shows that he was endeavoring to protect his own private interests without the slightest regard to the trust he had undertaken, and when on a bill to open and review that decree in favor of the widow and to enjoin its collection, he swore that he "made no resistance and was not disposed to contest any matters with her," and again, that he supposed her bill "was simply an effort on the part of the complainant in said case to set up and establish her claim to said legacies against the estate of said Henderson, and this your orator did not and does not now pretend to resist," and when this whole bill of review and for injunction, sworn to by him, shows that it was filed solely to protect his own private estate.
3. Any money paid by the executor to the widow, whether voluntarily or under a decree so obtained, should have been the interest of this estate, and no part of the *corpus*, in order to protect the executor against the remaindermen, and as the evidence is sufficient to sustain the verdict of the jury in finding the sum they did, as available *corpus* in his hands, we will not control the discretion of the court below in refusing to grant a new trial.

Administrators and executors. *Res adjudicata.* Remainder. Estates. Before Judge HALL. Newton Superior Court. September Term, 1875.

Reported in the opinion.

J. J. FLOYD, for plaintiff in error.

AMOS T. AKERMAN; CLARK & PACE, for defendants.

JACKSON, Judge.

Fortune N. Chisholm and three others brought their bill against Lee, the executor of Isaac P. Henderson, deceased, in which they alleged that they were entitled to certain property under the will of said Henderson, and particularly to an estate in remainder, in \$5,000 00 in money, and in the value of a negro girl to be purchased by the executor for Mrs. Ruth Henderson, the wife of the testator; that by virtue of said will the said Ruth Henderson took a life estate in said \$5,000 00, with remainder to complainants, and five others, children of said Isaac P. Henderson; that the negro girl was not purchased by the executor, but her equivalent in money went, by the terms of said will, to the said Ruth for life, with the remainder over to these complainants and the other children; that the assets of the said estate which came to the hands of said executor were sufficient to pay the said legacies for life, yet, that the said executor did not pay the \$5,000 00, or the use or interest of the same over to the said Ruth for several years; that the said Ruth instituted suit in equity for her interest under the will, and after some litigation a decree was had in her favor for the sum of \$7,279 40; whether this sum so recovered is the interest or principal and interest due the said Ruth is to be determined by the pleadings and proof in that case; that if the decree included the principal sum of \$5,000 00 loaned to said Ruth, and the amount of money proper and necessary to purchase the negro girl, then said decree was erroneously rendered, and cannot excuse said exe-

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cutor from accounting for the remainder with complainants, because they say it was the plain duty of the executor to have protected complainants as remaindermen either by bond and security for the repayment of the principal after the death of the said Ruth, or to have set up in his answer that said Ruth was entitled only to the interest on said sum; that said executor did not avail himself of these plain legal defenses, but relied on an insufficient answer, appearing without counsel in said important cause; that said executor paid over to the said Ruth the amount fixed by said decree, and sets up that said decree binds complainants and discharges him from paying them anything; whereas, they allege that said decree was the result of fraud or accident, of gross negligence or mismanagement by said executor; that the executor should have protected the rights of complainants, and failing to do so is chargeable for such dereliction; that said Ruth died in 1872, and that complainants are now entitled to the *corpus* of this estate, and they pray, waiving all discovery, for account and settlement.

To this bill the defendant, Lee, filed a full answer, setting forth the assets which came into his hands, their nature, and what he realized from them, and pleaded the judgment recovered by Mrs. Henderson and the payment thereof in bar of complainants' recovery. He also states that it was his duty to execute the will as construed by the court in that case; that complainants, as privies, are concluded by it; that they were all advised of the pendency of said suit of the said Ruth, and the rendition of the judgment, and should have protected themselves by a proper legal proceeding; he denied that the decree was the result of fraud or accident or negligence on the part of defendant.

The inventory and appraisal of Henderson's estate was introduced in evidence, the will and bill and decree in favor of Ruth Henderson, and the receipts of her counsel for the money due under that decree. The only oral evidence submitted was that of John Harris, who swore that he had no recollection of being notified by Lee of the pendency of the

suit of Mrs. Henderson; he got his share of Confederate money; also, the evidence of Robert J. Henderson, that he saw the money paid to Mrs. Henderson, his mother, by the executor; that he received his part of the Confederate money; that his mother died in October, 1872; that the executor gave up to him his larger note on his affidavit that it was given for negroes; that he was afterwards sued on it, and judgment went in his favor on the statute of limitations; also, the evidence of Mr. Akerman, who swore that a proper fee for defending this case would be from \$250 00 to \$500 00; also, that of Anderson, which is immaterial; also, that of John T. Henderson, who swore that he owed the estate \$2,100 00, and the executor owed him about \$1,800 00, and they exchanged notes; he gave his note to the executor for the difference, on which he was afterwards sued, and was protected by the statute of limitations.

The inventory and appraisement seem to be as follows:

Household and kitchen furniture,	\$1,000 00
One pleasure carriage,	500 00
One negro man, Carter, fifty years old,	2,500 00
One negro woman, Lucy, sixty years old,	0000 00
Thirty acres land,	1,200 00

NOTES, INTEREST, TO 6TH MARCH, 1863:

B. F. Carr, note, two credits,	\$1,304 00
Due July 25th, 1856, amount due, principal and interest,	1,665 85
B. F. Carr, due-bill, due August 20th, 1865,	\$ 400 00
Interest, \$43 16,	443 16
B. F. Carr, note, due 27th November, 1864,	4,000 00
Interest, \$77 77,	4,077 77
B. F. Carr, note; house, B. F. Carr,	5,000 00
B. F. Carr, note, due 25th July, 1863,	1,000 00
Interest, \$112 52,	1,112 52
J. T. Henderson, note, due January 3d, 1859,	1,802 53
Two payments interest, \$673 26,	2,475 71
Robert J. Henderson, note, due 11th July, 1861,	450 00
Interest, \$115 06,	565 06
A. H. Lee, note, due 25th February, 1864,	186 00
Interest, \$13 56,	199 56
Robert J. Henderson, note, due October 6th, 1861,	22 00
Interest, \$3 56,	25 56

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J. H. Berry, note, due December 25th, 1862,	30 00
Interest, \$4 55,	34 55
<i>Fi. fa.</i> , J. H. Berry, principal,	1,172 20
Interest, \$120 49,	1,292 69
Confederate certificates,	3,000 00

Of this inventory the executor shows a satisfactory disposition of the household and kitchen furniture, carriage and negroes, of the first notes of Carr, and of most of the other assets, except the \$5,000 00 note, reduced to \$3,500 00, and J. T. Henderson's note and some smaller items; that is, it is unnecessary for this case to make a point upon them, enough being left for our conclusion on the propriety of the verdict.

The following items of the will only are important for the adjudication of the case, viz: "I loan to my wife, during her natural life, \$5,000 00; also, that my executor purchase for my wife a negro woman or girl, such as she may select, the same to be loaned to her her lifetime, the same to be purchased out of the proceeds of my property."

"It is my will and desire that at the death of my wife the money loaned her, and the negro to be purchased by my executors, be sold and equally divided amongst all my children and my grand-daughter, Elderenda Brown." * * *

The bill of Mrs. Ruth Henderson claimed that the sum of \$5,000 00 and the value of the negro woman at the time of making said will, be paid over to her.

This bill was answered by the executor, who admitted the item of the will as charged, the death of the testator, and that he himself qualified as executor, and possessed himself of the things set out in the foregoing inventory except the household and kitchen furniture, carriage and mules which were given absolutely to Mrs. Ruth Henderson; that a negro woman, such as she would have selected, was worth, in good money, about \$800 00 or \$900 00. The answer said nothing about the estate in remainder, but in reply to specific questions, admitted the facts set out in the bill, but disputed the amount of assets charged against him.

On this bill and answer, the jury found a verdict for complainant for \$7,279 40, and on this verdict a decree was en-

tered up, but signed by the solicitor of the complainant and not by the chancellor, dated March 29th, 1871. Afterwards, on the 23d of May, 1871, an injunction was sued out against the said Ruth Henderson restraining the collection of said decree which was proceeding to levy upon the individual property of the executor, on the ground that the same was illegally signed as aforesaid, and the bill prayed that the said decree, and proceedings on which it was founded, might be reviewed. This bill alleged that "he made no resistance and was not disposed to contest any matters with her," and that "he supposed her bill was simply an effort to set up and establish her claim to said legacies, against the estate of Henderson, and this he did not and does not now pretend to resist," and the whole bill of review shows he was for protecting himself, and not these remaindermen. To this bill a very long answer was filed in which she, Mrs. Henderson, set forth all her grievances, charging him with abundant assets to pay her debt, that he, the complainant, was sworn as a witness himself on a former trial, and on a cross-examination admitted that her son who had owed the testator some \$2,200 00, had exchanged notes with him, whereby he had paid him some \$1,800 00 and given his note for the balance, and that he had a judgment against Carr for \$3,500 00, and yet refused to pay her a cent; that the complainant had married her daughter, but her daughter had died before her father, the testator, and this was the reason she believed he had treated her so badly.

Upon the coming in of this answer at the September term, 1871, of the court, an order was passed revoking the former decree, and entering up another one for the same amount signed by the chancellor, and annulling the injunction because there was no equity in said bill except the illegal signing of the decree as aforesaid. On this last decree the money was paid by the executor to Mrs. Ruth Henderson.

In his answer to the bill of the present complainants the executor admits the following available assets: \$3,500 00 against B. F. Carr, with interest from 28th September, 1867;

also \$1,441 13, the difference between Henderson's and the executor's notes, paid him by Henderson; also \$166 00, sale of thirty acres of land; also small note on R. J. Henderson for \$32 00; also the value of Confederate money on the small note of this defendant, say \$10 00, which, without computing interest, make the aggregate sum of \$5,139 13; whereby he claimed in his answer that he paid Mrs. Ruth Henderson \$376 62 more than all said available assets.

At the January term, 1875, of this court this case was here before us; (see 54 *Georgia Reports*, 611;) it was then ruled by this court that "the testator did not intend that the principal of the money bequeathed to his widow during her life should be destroyed in the use of it by her, but, on the contrary, he intended that his children and grand-daughter should have it after her death, and to carry out that intention his executors were appointed to execute his will, and it was their duty so to execute it as to effect that intention by investing the money, paying the widow the interest thereof during her life, and at her death to divide it equally among his children and grand-daughter, as directed by testator's will;" and this case was so ruled on the authority of *Thornton vs. Birch*, 20 *Georgia Reports*, 793.

The judgment of this court rendered in this case then, as contained in the *remittitur* transmitted to the court below, was "that the judgment of the court below be reversed on the ground that the court erred in deciding that it was the duty of the executor, under the will of the testator, to pay over to Ruth Henderson, his widow, the \$5,000 00 loaned her in the 4th item of the will."

The case comes back to us now with the additional facts contained in the record of the bill filed by Mrs. Ruth Henderson against the executor, and all the proceedings consequent thereon, and the final decree rendered on those proceedings, and the payment of the money to her by the executor under that decree. On the trial of that case the court charged the jury, 1st. "That if an executor sets up a decree against himself as a reason for a departure from the terms of the will, he must

show that either the pleadings filed to obtain the decree were made to have the will construed, or that under the pleadings evidence as to the construction was submitted, and the decree rendered in effect construing the will, and directing the executor what to do under the will." 2d. "That in this case Lee must show that a construction of the will was asked for either by the bill or answer in the case of Ruth Hendrrson against himself, or that evidence as to its construction was submitted and passed upon by the court and jury, and that the decree is in effect a decree construing the will, and directing him what to do under the will." 3d. "That the bill filed by Ruth Henderson claimed \$5,000 00, with interest. The answer of Lee did not contest her right to the \$5,000 00, nor does the decree, in express terms, construe the will or direct the executor, but is simply a decree for so much money. Such a decree, rendered on such a bill and answer, will not protect him in a departure from the will unless he clearly shows that evidence as to the construction of the will, was submitted and passed upon at the time, and that the decree in effect is a decree construing the will; for the will, the law as to him, prevented his paying it over, and his admissions of her right to recover the *corpus*, and the decree on that admission will not protect him any more than a payment of the money without a decree."

Error is assigned on each of these three charges; and also because the court refused to charge "that the judgment in favor of Ruth Henderson is for her interest under the will of Isaac P. Henderson, and is presumed to be for the correct sum and that presumption is conclusive on the executor and the legatees under that will, unless it be set aside for fraud;" and because the court erred in refusing to set aside the verdict, which was for the complainants, and to grant a new trial on the foregoing assignments of error; and because the verdict was contrary to law and against the evidence.

1. We think that the two first items of the charge of the court, to which exception is taken, may be considered as arguments or reasons leading to the conclusion to which his mind came on the law applicable to the facts of this case as they

appear in the pleadings and evidence disclosed in the record of the case of Ruth Henderson against the executor. If the court meant thereby to leave to the jury to draw their conclusions of law upon this record, he erred; but if he meant to explain the reasons on which his own judgment of the law, as set out in his third charge excepted to, was based, it was, perhaps, well enough. In any event, these charges did no harm, if he was right in the third charge wherein he ruled distinctly his view of the law applicable to the facts disclosed in that record. We consider the substance of that charge to be, that if the executor resisted the payment of the *corpus* of this estate on the ground that these remaindermen were entitled to it at the death of Mrs. Henderson, and in good faith and to the utmost of his ability, defended her suit against him for this *corpus*, and expressed a willingness to pay to her only the interest, then if constrained to part with the possession of the *corpus* by the decree of the court against his defense he would be protected; or if he insisted in his answer that such was the true intent and meaning of the will, then if overruled in this construction so set up by him in good faith, with the view to protect the remaindermen, he would be protected; and we understand him to say, in the third charge excepted to, that his answer, and all the pleadings and evidence, do not show that the will was construed, but show simply a decree for so much money, and that such a decree, rendered on such a bill, and with an answer filed by the executor, admitting the facts alleged in the bill, will not protect the executor. We have scanned this bill and answer closely, and examined this whole record, and we think the conclusion arrived at by the court below is correct. The answer of the executor sets up no defense in behalf of these remaindermen; he nowhere asks for a construction of this will, nor does he pray that the fund may be secured to the remaindermen at the death of the life-tenant by her giving bond and security for its preservation; nor does he ask that he may invest it, paying the life-tenant the interest annually, and preserving the *corpus* himself for the remaindermen. His whole defense is grounded upon his

want of available assets, of his loss of assets by the effects of the war, notes founded on slave debts, and other misfortunes incident to the times. The remaindermen and their interest are totally ignored. It is true, that after this decree was had by her against him, and the execution issued thereon was levied upon his *individual* property, he filed a bill of review and obtained an injunction restraining the collection of the money out of his private property; but even then he does not set up the rights of these remaindermen or make any prayer for their protection. His whole mind seems to be so engrossed with the care of his own interest that the trust committed to him by the testator seems to have been left to take care of itself. He expressly disclaims in this bill for injunction, that he contests what she asks for, but says only that the estate is not worth the money. His exact language in this sworn bill is, that "he made no resistance, and was not disposed to *contest* any matters with her;" and in another part of the same bill he adds, that "he did not, and does not now, *pretend to resist*;" and every allegation in this bill shows defense of self, not of the trust. This court ruled that the estate of Mrs. Henderson, under this will, in this money, was only a life estate, and that it was his duty, as a trustee, to protect it for those entitled to it in remainder. He has not attempted to do this; if he had tried and failed, he might have been excused, but he seems to have made no effort at all. His proper course would have been to file a cross-bill making the remaindermen parties, and having their rights as against the life-tenant adjudicated by the court, all the parties being before it. Failing to do this, he should at least have called the attention of the court to their interest, and had it passed upon in some form. The answer of Mrs. Henderson to his bill to review the first decree, discloses a state of facts not very creditable to her son-in-law, and certainly not entitling him to demand that a court of equity strain its powers in his behalf. It seems from that answer, verified by the facts of the case, that he left her without a cent from 1864, when her husband died, (and he was charged by the will to take care of her, and

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that she had the interest upon this fund, left her by her husband,) up to 1871, one year before she died, without paying her one cent. It seems from the facts that his excuse, that he had no funds of the estate with which to pay her interest, was but a flimsy pretext; one of the Hendersons exchanged a note he owed the estate for one that the executor owed him, and thereby the executor himself became indebted to the estate \$1,800 00, or some such sum. He could have paid her at least the interest on that from year to year; for this exchange of notes appears to have been made soon after the close of the war; and thus, for a long time he had interest in his hands belonging to her with which to pay her.

2. In respect to the refusal of the court to charge, at the request of defendant's counsel, that these remaindermen were concluded by the decree in favor of Mrs. Henderson, it is unnecessary to repeat, after what we have already said, that we do not think their rights were adjudicated in that litigation, and therefore we think that the court did not err in refusing so to charge.

3. It remains to consider a single question, which is, is the verdict contrary to evidence, or rather, is there evidence enough to support it? That verdict was for each of the complainants, \$630 09. There were nine remaindermen in all, which makes the whole amount which the jury found in the hands of the executor, \$5,670 81. The decree was rendered on the 25th of September, 1875; the proof is that Mrs. Henderson died in October, 1872, so that there was interest due upon whatever *corpus* should have been in his hands for the remaindermen at her death for nearly three years. He, himself, admits in his answer available assets to the amount of \$5,139 13, without computing any interest; the testimony of Henderson shows that the amount of indebtedness which the executor assumed in exchange of notes with him, was near or quite, \$1,800 00, instead of \$1,441 13, which he admits which would add more than \$300 00 to the *corpus* with which he is properly chargeable. It was his duty to have preserved this *corpus*, paying only the interest to Mrs. Henderson.

interest on it, since her death, counting but for two years, would exceed the verdict of the jury, when, added to the principal; the interest on what he admits himself, in his answer, without contesting that answer with the testimony of Henderson, counting it from the death of Mrs. Henderson to the date of the decree, would exceed this amount found by the jury. We have not passed unheeded the argument of defendant's counsel, that the larger portion of the verdict in favor of Mrs. Henderson was probably for interest, and that this interest should be deducted from the entire sum found, and the balance only would be the *corpus*. The reply is, that under the rulings of this court, when this case was here before, and also, under the same principle ruled in 20 *Georgia Reports*, the *corpus* could not be infringed upon to pay interest, but the fund should have been invested and the interest paid to the life-tenant annually, and the *corpus* saved for the remaindermen at her death. In any view which we have been enabled to take of this case, in the light of the decisions heretofore rendered by this court, and of all the pleadings and evidence which this voluminous record develops, after a careful examination of the law and the facts, we are forced to the conclusion that the verdict is right, and we therefore decline to control the discretion of the court below, before whom the case was tried, in refusing to grant the motion for a new trial. No returns, except the inventory and appraisement, were ever made by the executor, nor is there evidence to show any legal administration of the assets which came to his hands belonging to the estate in the payment of debts. He accounts for many of the assets, and shows their loss; but those *which he admits were good* are enough to satisfy the *corpus* of the fund found by the jury; and these he does not show satisfactorily were ever otherwise legally administered. In respect to counsel fees and costs, it is enough to say that they were incurred in his own defense and not in defense of his trust; and as he made no returns, and failed legally to administer the estate, he should not receive commissions.

Judgment affirmed.

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Winslow *vs.* O'Pry.

W. C. WINSLOW, trustee, plaintiff in error, *vs.* ADAM O'PRY,
for use, defendant in error.

1. The declaration at law upon a claim against a trust estate, must show on its face that the claim is for services rendered to the estate, or for articles, property or money furnished for the use thereof, or allege other facts sufficient to make a case where a court of equity would render the estate liable for the payment of the claim.
2. The execution must specify the property on which the same is to be levied. This requirement, since the execution must follow the judgment, renders it necessary that the judgment, also, should specify the property. And, as the judgment should conform to the pleadings, the property must, first of all, be specified in the declaration.
3. In a suit upon a note given by the trustee, a declaration which does not set forth any trust estate, contains no cause of action against the trust estate; and a judgment by default rendered against the trust property, will be set aside upon motion.

Pleadings. Trusts. Judgments. Executions. Before
Judge HILL. Houston Superior Court. May Term, 1875.

O'Pry, for the use of Jones, brought complaint against "W. C. Winslow, trustee, and Eliza N. Winslow, his *cestui que trust*," on a note dated February 1st, 1871, due one day after date, for \$140 00, and signed "W. C. Winslow, trustee for his wife." The declaration was in the statutory form, with this additional allegation: "Your petitioner further sheweth that said note was given for cotton seed furnished for the use of said trust estate." What constituted the trust estate was not alleged.

No plea being filed, judgment was rendered by the court against the defendants for the amount sued for, to be levied on certain described land "on which the defendant now lives, and any other property which may be found in possession of W. C. Winslow belonging to said trust estate."

The execution directed that the amount recovered be levied of the same land as was set forth in the judgment, describing it in the same words, except that the description concluded, "on which defendants now reside." No reference was made to any other property.

Winslow, trustee, moved to set aside said judgment, because the declaration did not set forth the trust property, because the judgment did not conform to the declaration, and because the execution was not in accord with the declaration and judgment. The motion was overruled, and he excepted.

WINSLOW & BRANHAM, by W. S. WALLACE, for plaintiff in error.

W. E. COLLIER, by brief, for defendants.

BLECKLEY, Judge.

The view which we take of this case is fully developed in the head-notes. The declaration, considered as an action aimed against the trust property, was fatally defective in not specifying any such property. It did not even allege directly that there was any trust estate. Whether a judgment upon it might have been rendered against the trustee, personally, we need not consider, as no such judgment was rendered. That which was rendered should have been set aside as unwarranted by the law applicable to the pleadings.

Judgment reversed.

ORRIE TUFTS, plaintiff in error, vs. WILLIAM LITTLE, administrator, defendant in error.

When the vendor of lands puts the vendee in possession thereof under a bond for titles, and the vendee has remained in possession some four years, enjoying the rents, issues and profits thereof without having paid anything either on principal or interest of the purchase money, and the premises, by reason of no repairs and bad cultivation, are daily deteriorating in value, so as to have become insufficient to pay the debt due thereon, and the vendee has become insolvent and gone into voluntary bankruptcy, and the vendor applies to a court of equity for an injunction against further waste of the land and use of the profits, and also for a receiver to take charge of the same and preserve the rents, issues and profits to abide the final hearing: *Held*, that there is equity in the bill, and that this court will not control the discretion of the court below in granting the injunction and appointing a receiver.

Injunction. Receiver. Vendor and purchaser. Before Judge BARTLETT. Jones county. At Chambers. January 22, 1876.

Reported in the opinion.

BLOUNT, SIMMONS & HARDEMAN, by Z. D. HARRISON, for plaintiff in error.

HALL, LOFTON & BARTLETT, for defendant.

JACKSON, Judge.

The intestate of Little sold certain lands to Tufts, and put him in possession, and gave him bond for titles thereto. He paid nothing therefor, either of principal or interest, but had been in possession four years, using the rents, issues and profits of the lands; had become insolvent and gone into bankruptcy on his own petition, and was totally unable to respond for damages or rent in ejectment, or to pay the money due on a suit for the purchase money; he had alleged falsely and fraudulently to the bankrupt court that the title was in him, and had a homestead assigned him there in said lands; the lands had greatly deteriorated in value by reason of non-repairs and unskilful cultivation, and would not pay one half the debt of \$1,880 90, purchase money, without the application of the rents for that purpose. The complainant alleged the foregoing facts, substantially, and afterwards, by amendment, added that another tract was embraced in the said note for the purchase money; that she, the intestate, gave her bond for titles for that also; that it has deteriorated in value, and is not now worth half the price agreed upon, for the same reasons of unskilful cultivation and want of repair; that defendant has used this tract of land in the same way; that he was solvent when the trade was made, but has become insolvent since that time.

The defendant, in his answer, set up that some of the consideration of the note was money loaned him, and only ~~the~~

value of one of the tracts of land; that set up in the amendment was in the note for \$1,880 90; that the consideration was *that land* and money loaned to him; that, as security for the note, he executed title to the lands first set out in the bill, and she, the intestate, gave him bond for titles when the note was paid; that this was 27th December, 1871. He admitted that he had paid no part of the purchase money, also, his insolvency and bankruptcy, but denied false representations to the bankrupt court. An affidavit of one Hurt was read by the complainant, to the effect that the lands had deteriorated by the bad management of the vendee, and were not worth the principal and interest of the debt. The defendant admitted the use of the rents, issues and profits.

The bill prayed for an injunction to restrain the defendant from renting or using the lands, and for the appointment of a receiver to hold them and preserve the rents, issues and profits thereof until the hearing.

The court granted the injunction and appointed the receiver, and this is the error assigned.

The bill and answer are at variance only in respect to a part of the land, which part, the defendant contends, he sold to the intestate of complainant for money loaned, and took her bond for titles thereto on payment of that amount. As to the other part it is admitted that complainant's intestate sold it to the defendant. It does not matter, materially, inasmuch as the transaction occurred subsequently to the act of 1871: Code, sections 1969, 1970, and by the terms of that act conveyed the title, if the deed was made under it to secure a loan: *Carswell vs. Hartridge*, 55 *Georgia*, 412. If the deed was not made under that, the transaction would constitute an equitable mortgage, and the equities of the parties would probably be the same. At any rate this court will not control the discretion of the chancellor in settling controverted facts, unless greatly abused. So that the question presented by this record is this: Where vendor sold lands to vendee and gave bond for titles, and put vendee in possession, and by unskilful cultivation or otherwise, while in possession of the vendee, the lands deterio-

rate in value so that they will not pay the debt, and the vendee has paid nothing, and though solvent at the time of the trade, has become insolvent and is bankrupt will a court of equity enjoin such vendee from using the rents, issues and profits of the lands and put them in the hands of a receiver to be preserved for the final decree in the case? We are not aware that the precise question thus made has been ruled by this court. Questions, analagous, however, have been adjudicated here. In *Collier vs. Sapp*, 49 *Georgia Reports*, 93, it was held that where plaintiff sues for balance of purchase money, and under the relief act of 1868, the jury return the land to him and require him to pay \$3,553 27 to defendant, and the defendant brought the case to this court, and got a *supersedeas*, and then withdrew the writ of error, and remained in possession, and received large rents and profits, and plaintiff had paid taxes to prevent sale of the land, and defendant had it levied on by execution, and plaintiff offered to pay the verdict after deducting rents and profits, it was ruled that the court should enjoin the defendant from proceeding with the execution, and appoint a receiver to take charge of the lands and preserve the rents, issues and profits until the final trial of the case. The principle decided in that case would seem to cover this. The case of *Walker et al. vs. Zorn*, 50 *Georgia Reports*, 371, decides that equity will not impound cotton and corn made on lands claimed by complainant pending an ejectment, and restrain their sale by the defendant, *the crops being already made and gathered*; but the court says, "the prayer is not that the land shall be put in the hands of a receiver and rented in the interest of both, but that certain corn and cotton, the property of defendant, shall be impounded," thereby implying that had the prayer been to put the land in the hands of a receiver to preserve future rents and issues to abide the suit, it would have been granted. The case of *Jordan vs. Beall et al.*, 51 *Georgia Reports*, 600, rules that relief in such a case as this, the vendee being in possession under bond for titles, will not be granted by the appointment of a receiver, *it not appearing that the vendee became insolvent after making*

the purchase. The court, TRIPPE, judge, delivering the opinion, seems to put the case upon the ground that Beall was insolvent when he bought from Jordan, and that Jordan knew it. Here the allegation is distinct, and not denied, that Tufts was solvent at the time of the trade and had gone into bankruptcy and become utterly insolvent since. In Edwards on Receivers, page 51, a case in 5 Paige, 38, is cited to the effect that a receiver of rents and profits ought not to be appointed when the mortgage is not wholly due, and when the mortgagee has neglected to take a pledge of the rents and profits of the whole premises to keep down the accruing interest in the meantime; but that if the whole mortgage debt were due, and the premises were not of sufficient value to pay the debt and costs, then the court might consider the complainants in equity as immediately entitled to the whole estate pledged as a security for such debt and costs and appoint a receiver of the rents and profits in anticipation of a decree, at any time after the filing of complainants' bill. In the case here all the money is due; the complainant's title is better than a mortgage in respect to part of the land; he is the vendor and has given bond for titles to convey; in respect to the balance, by the act of 1871, he holds the absolute title until his debt is paid, taking for true defendant's own theory of the facts; or if the transaction was not under the act of 1871, he is an equitable mortgagee. In any view the case is stronger than that cited by Edwards as to the greater part of the land involved, and as strong in respect to the rest of it. We think, therefore, that authority, to a considerable extent, will sanction the decision of the court below, and sound reason and natural equity abundantly sustain it. The vendee of lands is in possession under only a bond for titles; he is unskilfully using them, and does not repair; they are deteriorating every day in value, so that they will not pay half the principal and interest due thereon; he has become insolvent, has gone into bankruptcy, and had a homestead set apart; has enjoyed the profits four years and has not paid a cent of principal or interest; if sued in ejectment he will hold the vendor at bay for

Johnson & Smith *et al.* vs. Farnum *et al.*

years to enjoy more rents and profits; if sued on the notes the same will be the result; the vendor asks a court of equity to stop such iniquitous conduct, irremediable in any other court, and to preserve the lands and their fruits to await the final verdict of a jury on the facts, and the decree of the court thereon. The justice of the prayer seems to us apparent from a mere recital of the facts, and we affirm the judgment of the chancellor in granting the relief by injunction, and in the appointment of the receiver.

Judgment affirmed.

JOHNSON & SMITH *et al.*, plaintiffs in error, vs. WILLIAM W. FARNUM *et al.*, defendants in error.

1. After personal property is sold and delivered there is no lien for the purchase money implied by law, even though the purchaser was insolvent and knew he was unable to pay.
2. The right to rescind a sale for fraud must at least be claimed, if not exercised, before a court of equity will treat the sale as rescinded or subject to rescision.
3. Creditors without lien or title, and who have not reduced their claims to judgment, have, as a general rule, no right to invoke interference by injunction and receiver to prevent an assignment of the debtor's goods, or to deprive the debtor or his assignee of possession. This rule holds as to debts not due as well as to those past due.

Injunction. Sales. Lien. Rescission. Debtor and creditor. Before Judge KIDDOO. Terrell county. At Chambers, December 3d, 1875.

Reported in the opinion.

IRVIN & GRESHAM, for plaintiffs in error.

C. B. WOOTEN; L. C. HOYLE; SIMMONS & PICKETT; A. HOOD, for defendants.

BLECKLEY, Judge.

A debtor made an assignment for the benefit of his creditors, but inserted a condition that they must relinquish their claims, or treat them as fully paid, in order to take the benefit of it. Shortly thereafter certain creditors complained by bill of this assignment, and prayed for injunction and receiver. They alleged that certain of their debts were not due; that the goods purchased from them were bought while the debtor was insolvent and when he knew that he would be unable to pay for them; that some of these goods were still on hand, having but lately been delivered to the debtor; and, as to these, they set up a special lien on the goods for the purchase money. The bill, however, does not seek to rescind the sale for fraud. It alleged no election to rescind on the part of the creditors, and prayed for no rescission.

Here was no contract for lien. After sale and delivery of personal property the law implies no lien for purchase money.

1. We are not aware that any lien arises by implication in consequence of the purchaser being insolvent or of his knowing when he bought that he was unable to pay.

2. The seller of goods undoubtedly has a right to rescind for fraud; but he must, at least, claim the right, if not exercise it, before a court of equity will treat the sale as rescinded or subject to rescission. The bill before us claims no right to rescind but proceeds on a wholly different ground.

3. We are unable to distinguish this case from a great number heretofore decided, to the effect that creditors who have no lien and no title, and who have not reduced their claims to judgment, are in no condition to call for injunction and the appointment of a receiver. This rule, we think, applies in the case of voluntary assignment for the benefit of creditors as well as to sales or pretended sales by the debtor to other persons. Whether the debts are due or not makes no difference. The difficulty under which creditors labor is that they have not established their claims by judgment. Until they do so they have no right to deprive the debtor or his assignee

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of possession. As to the validity of the assignment, there is no question about that. Both parties, in the argument, treated it as void; and it undoubtedly is so as to all creditors refusing to abide by it, on account of requiring the creditors to relinquish in order to take its fruits.

Judgment affirmed.

THE AUGUSTA AND SUMMERVILLE RAILROAD COMPANY,
 plaintiff in error, *vs.* NATHAN W. PEACOCK, administra-
 tor, defendant in error.

1. Apprehension of suit by an administrator, when appointed, will not authorize a person to appear as a party in the court of ordinary to resist the grant of letters; especially if the administrator, when appointed, from the facts admitted will have no cause of action against such party.
2. Before one can be heard as a party to the proceeding before the ordinary, he must show that he has an interest in the choice of administrator, either as heir or creditor; some interest on the part of the objector in the assets and their distribution must appear.

Administrators and executors. Before Judge BARTLETT.
 Richmond Superior Court. October term, 1875.

Reported in the opinion.

FRANK H. MILLER, for plaintiff in error.

H. CLAY FOSTER, for defendant.

JACKSON, Judge.

The defendant in error, Peacock, applied for letters of administration on the estate of a child two years old, his nephew, who was killed by the Augusta and Summerville Railroad Company, alleging that the child had personal property in the county of Richmond. The railroad company objected on the ground that the deceased left no creditors in Georgia, nor any property at all, and that deceased was killed by the road.

without negligence; that the entire estate of deceased consisted of a claim for damages for this homicide, and that the administrator would have no cause of action for that. The case was tried on the appeal, when the applicant demurred to the objections, insisting that the railroad company could not be heard. The court inquired about the domicile of the child, when it was agreed that the father of the child was a widower, and lived in South Carolina, but the child lived, for the most part, with the grand-mother, in Richmond county, Georgia. The court thereupon ordered that the grant of administration be sustained on the ground that the child was domiciled within the jurisdiction, and the railroad company excepted.

We think that the railroad company had no right to be heard before the ordinary. If we hold that it might be heard to contest this right of administration because it might, perchance, be sued by the administrator, the effect would be to open the doors of the court of ordinary to every person who suspected he might be charged with being a debtor, and to allow him to contest his debt before that court. The facts here show that this company has no interest in this estate. No cause of action exists against it. If this administrator shall sue the company he will pay the costs for his trouble, and get nothing for his pains. This applicant alleges that the child has property in the county of Richmond, and was domiciled there when he was killed. The company had no right to contest these points in the judgment of this court. In the case cited from Indiana, 26 Indiana, 477, it seems that the action was being prosecuted when the motion was made to revoke the letters. It is not, therefore, exactly this case. In 32 *Georgia Reports*, 299, the fact that the deceased had, apparently, title to a lot of land in the county, was held sufficient for the grant of letters; and no point was made on the right of the party in possession to object, therefore that case does not rule that such an objector can be heard. In 22 *Georgia Reports*, 358, this court lays stress upon the fact that the object of the grant of letters to a non-resident was to sue his estate, not to enable it to sue anybody else, and therefore affirm the judgment of the

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court below refusing the grant of administration. We are not aware of any case in this state where it has been ruled that a party, apprehensive that he might be sued by an administrator, when appointed, might intervene on account of such apprehension, and be heard before the ordinary on the question of the grant of letters. We think it best not to open the doors to such intervention. It might transfer to the ordinary questions of title to land, suits *ex delicto*, like this, and other matters not properly within the jurisdiction of that court. This railroad company must, therefore, bide its time; if sued by the administrator for this cause of action, which we hardly anticipate, its defense will be easy and the result rapid; a demurrer will dispose of the case.

Judgment affirmed.

GILBERT & SCOTT, plaintiffs in error, vs. M. A. MARSHALL,
defendant in error.

In the affidavit to foreclose a lien in behalf of the owner of a steam saw-mill, it must appear, affirmatively, that the demand for payment was made when, or after, the debt became due. It is not sufficient to swear to a demand generally with no indication as to time.

Saw-mill lien. Demand. Before Judge WRIGHT. Mitchell Superior Court. May Term, 1875.

Reported in the opinion.

DAVIS & LYON, by R. F. LYON, for plaintiffs in error.

No appearance for defendant.

BLECKLEY, Judge.

Affidavit to enforce a lien for lumber sold by the proprietors of a steam saw-mill alleged a demand upon the debtor for payment, and a refusal to pay, but did not fix the date of the demand or show whether it was before or after the debt

became due. The debtor having filed an affidavit contesting the execution and the enforcement of the lien, on the ground of payment, when the case came on for hearing, the court, upon the defendant's motion, ruled the plaintiff's affidavit insufficient, and passed an order quashing the execution.

According to the general principles of pleading, time should be averred in connection with every material fact: 2 *Kelly*, 92; 8 *Georgia Reports*, 178. In the summary enforcement of liens, demand is so material that it stands in place of suit. It is the only notice which the debtor has prior to the actual seizure of his property: *Anderson vs. Beard*, 54 *Georgia Reports*, 137. The true rule of law in reference to strictness in the observance of statutory requisites in these summary proceedings, is laid down by the chief justice in that case. In the prior case reported in 46 *Georgia Reports*, 198, attention does not seem to have been called directly to the point of showing the time of demand. We do not rule now that the exact date should appear, but that enough should be set out to show clearly that the demand was made after the debt became due. The affidavit before us, even when read in connection with the bill of particulars annexed, does not affirmatively disclose that fact. No indictment for perjury could be maintained on this affidavit by proof that the demand was made before the debt became due and not afterwards. The court below held the affidavit insufficient, and the ruling is to be taken as *prima facie* correct. It is certainly in line with sound principle; and is supported, moreover, by the plain tenor of the decision made here in *Anderson vs. Beard*. Although my brother JACKSON has grave doubts, and I, myself, feel embarrassed by the case cited in 46 *Georgia Reports*, we all concur in affirming the judgment.

Judgment affirmed.

JOHN LOUDON, assignee, plaintiff in error, *vs.* BLANDFORD & GARRARD *et al.*, defendants in error.

1. The assignee of a bankrupt has the right to be made a party to a rule to distribute funds in the hands of a receiver, raised from the sale of the bankrupt's property by order of the state court, and to contest the demands of the creditors claiming liens and judgments thereon.
2. The state court will distribute the fund in accordance with law, the bankrupt law of the United States constituting, on the question of such distribution, the controlling part of such law.
3. Attachments on the property, the sale of which raised the fund, if levied within four months of the adjudication in bankruptcy and dissolved by order of the state court, lose their lien upon the fund; and such lien is not revived by general judgments obtained after the adjudication, nor can such judgments claim the fund in preference to the assignee.
4. A distress warrant for rent levied on the property, the proceeds of which is for distribution, before the adjudication in bankruptcy, should be paid out of the fund which represents the property distrained,
5. Justice court judgments fairly obtained before the adjudication are entitled to be paid.
6. A mechanic's lien properly recorded within three months and sued by attachment within twelve months, and not sued again after the attachment was dissolved because of the bankruptcy of the debtor, is entitled to payment and will rank from the date of the lien.
7. The costs of the officers of court and commissions of the receiver should be first paid.
8. If any of the claimants be legally entitled to the whole fund, after the assignee is fairly heard on any issue he may make, the assignee's interest in the whole fund is at an end, and such claimants may divide it among themselves and other claimants as they see fit, and a consent order, or judgment of the court, to that effect will not be disturbed by this court.
9. The assignee in this case having a bill pending in the United States court to set aside the sale of the property that brought this fund into the state court, must first dispose of that case before he can claim any part of this fund to be paid to him. Upon satisfactory evidence being furnished the court that he has dismissed his bill in the United States court, the part which may be left should be paid to him; otherwise it should be held to await the result of that bill in that court.

Bankrupt. Attachment. Mechanic's lien. Distress Warrant. Judgments. Costs. Before Judge JAMES JOHNSON, Muscogee Superior Court. May Term, 1875.

Reported in the opinion.

R. J. MOSES, for plaintiff in error.

BLANDFORD & GARRARD ; PEABODY & BRANNON ; G. E. THOMAS, for defendants.

JACKSON, Judge.

A fund of some \$1,500 00 was in the hands of Charles Coleman as receiver, which was raised from the sale of certain property of the Empire Cotton Seed and Huller Company. The property had been levied on by attachments and judgments from various courts, and was sold by order of court, and went into the hands of the receiver. Blandford and Garrard, representing one of the judgments as assignees thereof, moved a rule for the distribution of the fund and claimed that they were entitled to be paid, because they had attached the property and had obtained a general judgment against the company. This general judgment was had after the adjudication in bankruptcy. Their attachment was sued out within four months of the time when the defendant, the Cotton Seed Company, was adjudged a bankrupt, and so were the other attachments levied; and they were all dissolved by virtue of the bankrupt law and by order of the superior court of the county of Muscogee. Various parties to the rule were made claiming the fund or parts of it, among them the plaintiff in error, the assignee in bankruptcy of the Empire Cotton Seed and Huller Company, who represented to the court that he was entitled to the fund as such assignee; that there were a large number of creditors not in the rule whom it was his duty, as such assignee, to protect; that he had filed a bill to set aside the sale of the property in the district court of the United States, and he prayed that he be paid the fund to hold to await the result of that suit, for the creditors if the sale was not set aside, and to be paid back to the purchasers if it was. He attacked all the judgments which claimed the fund, and set up his own claim thereto as such assignee.

The court below ruled that he had no right to interpose, and all the other claimants assenting thereto, passed an order

Loudon vs. Blandford & Garrard *et al.*

distributing the money among them as they agreed. The question is, was the assignee a proper party to the money rule, and did he have a right to the fund or any part thereof?

1, 2. In respect to the first question, we think it clear that he had a perfect right to be made a party to the rule, and to be fully heard thereon upon such issues as he might make in law or in fact, attacking all or any of the liens which claimed the money. The assignee represented the bankrupt. The money raised from the sale of the bankrupt's property was to be distributed. Why should he not, considering him merely as the legal representative of the bankrupt, be a party to the rule, and see to it that the fund was properly distributed, and attack such creditors as the bankrupt, had he not gone into bankruptcy, might have attacked. But he, the assignee, is not only the representative of the bankrupts, but the trustee for all the creditors, and it is his duty to protect the common fund. This ruling here is not at all inconsistent with the previous rulings of this court in the case of *Freeman vs. Fort et al.*, 52 Georgia, 371, and the case of *Ballin & Company vs. Ferst et al.*, 55 *Ibid.*, 546. The first was a creditor's bill, an equity proceeding, and it was held that the trustees appointed in lieu of the assignee could not, on mere motion in such a proceeding, have the fund in the hands of the court's receiver turned over to the bankrupt court. It would require some action by that court—an injunction against the parties by regular bill or some equivalent process—before the state court would turn over the assets in its custody to the United States court. The other case was also a proceeding in equity, and there it was held that on petition, supported by proper record evidence, the state court would order the assets turned over to the bankrupt court to be there administered. It was also there held that the trustees in bankruptcy were entitled to assets seized on *mesne process* within four months of the adjudication, provided the *mesne process* was not founded on a previous contract lien, and an injunction had been granted by the United States court. But this is not like either of those cases. Here the circuit court had the funds in hand in the possession

of the receiver, and it is right that it should distribute these funds according to law, including the bankrupt law. If there were lawful liens duly foreclosed, or judgments duly obtained, and these liens were not in conflict with the provisions of the bankrupt law, that law being paramount, this court has held, and still holds, that the state court will dispose of the fund in its hands to the payment of those liens; but it has never held that the assignee of the bankrupt and its only legal representative, his own mouth being closed, may not be heard upon the question of how the fund should be distributed. It would be very strange if nobody could represent the debtor whose property was being disposed of, and if it were the law that the creditors *before the court* could have an order passed dividing it out to suit themselves, over the head of the assignee objecting to such order and representing the other creditors. We feel constrained therefore, to reverse the judgment of the court below, and to direct that the assignee be allowed to contest on issues of fact, if he has any to make, such of these claims as he may attack for fraud, and on matters of law such as he may deem illegal. The record shows that he was not permitted to do so, not even to the extent of seeing that the liens were properly proven. Inasmuch as the case will go back to be heard again, and it may facilitate the trial of the issues so made, we go further and express the opinion of this court on the points of law involved, so far as this record discloses them.

3. The attachments which were dissolved by the order of the court below, in accordance with the bankrupt law, lose their liens and cannot claim this fund, or part thereof, in consequence of such liens by attachments: Bump., 8th ed., p. 595; *Ballin & Company vs. First & Company*, 55 Georgia Reports, 546. If general judgments, by service of the bankrupt or his agent, or otherwise, were obtained on these claims which were thus levied by attachment, such judgments, *obtained after the adjudication in bankruptcy*, have no lien, and should not be paid.

4. If a distress warrant were issued for rent and levied be-

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fore the adjudication, and the fund was the proceeds of the property so levied, it should be paid out of such part of the fund as the property distrained, when sold, brought into court: Bump., p. 585, and cases cited.

5. If justice court judgments were fairly obtained prior to the adjudication, such judgments, being liens on all the property of the debtor, should be paid, there being nothing in the bankrupt act providing for the dissolution of such liens, they being *final process*: Bump., page 594, and cases cited under the head of executions. If fraudulently or collusively obtained they should not be paid: See Bump., p. 594, *et seq.*

6. If mechanics held a lien on the property sold, duly recorded within three months, and brought suit thereon in twelve months by attachment, their lien attaches from the date of the work done or material furnished and not from the attachment or by virtue of the attachment, and it is not lost by the dissolution of the attachment but should be paid: Bump., p. 591; *In re Hoyt*, 3 Biss., 436: Code, sections 1959, 1963.

7. The costs of the officers of court and the commissions of the receiver should, of course, be paid first of all.

8. If the lien of any of these creditors should sweep the whole fund—that is, any lien not inconsistent with the bankrupt law—there would of necessity be nothing left for the assignee, and it would be no business of his how the fund was distributed. In such event, the parties interested may divide as they see fit. If, for instance, the mechanic's lien should take, it would exhaust all the fund, and if the holder of that lien chose to divide with others, no one would have the right to interpose. If the assignee should represent any creditor who holds a lien superior to any or all of these, then that creditor would be entitled to be paid first, and the fund should not be paid to others. On the whole, we send the case back because we think that the assignee, as the representative of the bankrupt and of the creditors not in person before the court, has the right to be made a party to the rule, to see that no illegal or fraudulent claim is paid, to the detriment

of the bankrupt's estate or of the creditors thereof whom he represents.

9. If the court should ascertain that the fund is not exhausted in the payment of the liens of creditors claiming it, then the balance, we think, should be paid to the assignee upon his relinquishment of all claims upon the property sold, and the dismissal of his bill to set it aside, satisfactory evidence of which should be furnished to the court. He cannot go upon the property and the fund both. He must elect which he will take, and a reasonable time should be allowed him to make his election, if the fund is not exhausted by such liens before the court as he cannot overthrow after a fair hearing. The trial of these, however, and the payment of such as are proper liens under the foregoing directions, should not be postponed to await such election. If he choose to go on with the bill, the part of the fund left, if any, will be held to abide the event of that bill.

We reverse the judgment on the ground that the assignee has the right to be made a party to the rule and to be heard thereon.

Judgment reversed.

J. F. & L. J. MILLER, plaintiffs in error, vs. ROBERT H. KERNAGHAN *et al.*, defendants in error.

1. An assignment by a debtor for the equal benefit of all his creditors, violates no law or public policy of this state. Therefore, such an assignment lawfully made in South Carolina by a resident thereof, will pass personal assets found in Georgia.
2. Such assets having been attached here, (by garnishment,) at the instance of Georgia creditors, after the execution of the assignment and notice thereof given to the garnishee, a judgment applying to their claims a *pro rata* share of the assets, and no more, is quite as favorable to the attaching creditors as the law of the case will warrant.
3. Against such an assignment the courts of this state will not hold the assets here for administration till Georgia creditors are satisfied in full.

Miller vs. Kernaghan *et al.*

Debtor and creditor. Assignment. Garnishment. Comity.
Before Judge GIBSON. Richmond Superior Court. April
Term, 1875.

Reported in the opinion.

H. CLAY FOSTER; JOHN S. DAVIDSON, for plaintiffs in
error.

FRANK H. MILLER, for defendants.

BLECKLEY, Judge.

A British insurance company having an agent in Augusta, Georgia, issued a policy, through the latter, upon a stock of goods in South Carolina, belonging to a resident of that State. The risk became a loss on the 18th of January, 1875. Two days thereafter the policy was assigned in South Carolina, by the assured, to trustees, also residents of that state, in trust, to disburse the amount which might be collected thereon, among his creditors, according to the amount of their claims, *pro rata*, and to pay the expenses of such disbursement. Notice of the assignment was given to the company's agent in Augusta on the next day after it was made. After the reception of this notice, but upon the same day it was received, the agent was served with a summons of garnishment, at the instance of the plaintiffs in error, attaching creditors of the assured, residing in the state of Georgia. The attachments were founded on debts by open account. Judgments against the defendant in attachment were rendered in due time, and thereafter, the fund admitted by the garnishee's answer, being in the power of the court for distribution, plaintiffs in attachment claiming a sufficiency of the same to satisfy their attachments, and the trustees claiming the whole by virtue of the assignment, the court ordered that the plaintiffs have leave to enter up judgment against the garnishee for their *pro rata* share of the fund only; and that the balance be paid over to the trustees for disbursement under the terms of the assigna—

ment. It appeared to the court that there were numerous creditors, and that the aggregate of their claims was largely in excess of the fund, which fund, so far as appeared, constituted all the assets of the debtor.

1. Our courts will not regard an assignment made in another state which, as to assets here, contravenes our own law or declared public policy: 12 *Georgia Reports*, 582; 35 *Ibid.*, 177; 37 *Ibid.*, 262. But this assignment would have been good had it been made here: Code, section 1952. In it no trust or benefit is reserved to the debtor or to any person for him. The creditors are the sole beneficiaries, and they are all placed upon an equal footing. No preference or partiality is shown to any. It is impossible to conceive of an assignment more free from objectionable features. It was taken for granted in the argument that it was valid under the laws of South Carolina, and we know of nothing to impair its validity here.

2. The court permitted the attaching creditors to have judgment against the garnishee for their *pro rata* share of the fund. In so doing, we are not sure but that the court trenched upon the strict legal title of the assignees, who, it seems, were before the court claiming the whole fund under the assignment. Treating the assignment as valid, it passed the legal title to the trustees, whether the creditors accepted or not: 10 *Georgia Reports*, 274. The trustees had accepted the trust before the fund was attached, one of them having notified the garnishee of the assignment on the day garnishment was served, but before it was served.

3. It was urged in the argument that the domestic tribunals will hold assets against a foreign assignment, and administer them till domestic creditors are satisfied in full, or so far as the assets within the jurisdiction will extend. Certainly this would be done if the assignment were not conformable to our own law; but there would be an inconsistency in recognizing the assignment as perfectly valid here, and then refusing to yield to it. There may be decisions in other states or countries on that erratic line, but we are sure

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sound principle is the other way, and so we believe is the weight of authority: See Burrill on Assignments. We think most courts have ruled, as we do, that a foreign assignment, at variance with the domestic law, will not be suffered to take effect on domestic assets to the prejudice of domestic creditors; but that an assignment, whether foreign or domestic, that presents no conflict with any law, is to have full effect on all assets to which its terms apply. In the present case the most that domestic attaching creditors could claim, was to hold off the foreign trustees as to so much of the funds as amounted to the *pro rata* share of these creditors, which was done. The trustees do not complain of the judgment. The creditors do complain, but ought not.

Judgment affirmed.

Z. T. & J. H. ELLINGTON, administrators, plaintiffs in error,
 vs. CORNELIUS BENNETT, defendant in error.

1. Actions on the case, for damages to plaintiff by defendant, caused by the erection of a mill-dam and ponding of water, whereby the value of plaintiff's plantation, as a whole, is seriously diminished, and the health of his family destroyed, and medical expenses incurred, and large and rich bottom lands rendered unproductive by being kept too wet for cultivation, do not abate on the death of the plaintiff, but survive to the administrator, who should be made a party plaintiff, on motion, if the declarations allege facts which show that the defendant derived benefit from the *tort* with which he is charged.
2. The allegation that defendant derived benefit from the *tort*, by the improvement of mill property, of which he was the owner, and that he erected the dam and ponded the water so as to increase the capacity of his mill, would be sufficient, and if such allegation be not distinctly made in the original declaration, the administrator should set out his application to be made a party, in writing, with his proposed amendment therein, and thereupon the court should grant his motion.

Actions. Abatement. Administrators and executors. Before Judge BUCHANAN. Fayette Superior Court. August Term, 1875.

Reported in the opinion.

SPEER & STEWART, for plaintiffs in error.

B. H. HILL & SON; J. L. BLALOCK; DORSEY & BRADLEY, for defendant.

JACKSON, Judge.

Three actions on the case were brought by Ellington, in his lifetime, against Bennett, for damages caused by the erection of a mill-dam and the ponding of the water occasioned thereby. The first was for injury to the health of the family and medical expenses incurred thereby; the second was for injury to the plantation generally, and the third was for injury to certain bottom lands which, by the mill-pond, were rendered too wet for cultivation. After the death of Ellington, his administrators moved to be made parties plaintiff, and that the cause proceed; the court refused to grant the motion, the administrators excepted, and assigned for error the refusal to make the administrators parties. The question is whether actions for such a *tort* abate by the death of the plaintiff or survive to the administrator.

1. Section 2967 of the Code enacts that "no action for a *tort* shall abate by the death of either party where the wrongdoer received any benefit from the *tort* complained of." It is, therefore, clear that these actions do not abate if the defendant derived any benefit from the erection of the mill-dam. If he did the actions do not abate, if he derived no benefit they do abate. The defendant would hardly have put up the mill-dam and ponded the water unless his own property, the mill, was made more valuable, and its capacity for grinding increased. Any improvement of his property is a benefit to himself. Such actions as these, with proper allegations and averments, do not, therefore, abate, but survive to the administrator.

2. In these cases, however, it is not alleged that the defendant was the owner of the mill, or his property therein

was increased in value, or that its capacity for grinding was made greater, or that he acquired a greater head of water for the purposes of his mill, or that his property or himself was benefited by the mill-dam. There are no such clear averments in either of these declarations. There is a vague and shadowy idea that such are the facts sought to be conveyed by the declarations, and this is all that can be said of them. We think, therefore, that as they stand they are insufficient to give to these administrators the right to be made parties. But section 3438 of our Code, declares that "no suit shall abate by the death of either party, where such cause of action will, in any case, survive to or against the legal representatives of the deceased party either in the same or any other form of action." This section would seem to provide for a very liberal rule of amendment in the event that the original declaration was insufficient. In these cases we think them insufficient, and that there is barely enough in them to amend by. Still, as we think there is enough, we will hold that the administrators upon setting out in their petitions to be made parties, amendments in writing to the effect that the defendant was benefited, and wherein, and how, may be made parties, and such amendments be allowed. We affirm the judgment of the court below in refusing to grant the motion upon the declarations as they then stood, but we direct that the administrators have leave to make their petitions to be made parties in writing, and to set out therein their proposed amendments, and upon these amendments, showing that the defendant was benefited by the *tort*, that they be made parties plaintiff, and that said causes thereupon proceed.

Judgment affirmed.

JAMES C. FREEMAN *et al.*, plaintiffs in error, vs. ALBERT D. CRAVER, administrator *de bonis non*, *et al.*, defendants in error.

(WARNER, Chief Justice, being interested in the result of the litigation, did not preside.)

1. A consent decree, after full execution and many years of acquiescence, ought not to be disturbed.
2. Ignorance of fraud which, by the use of ordinary diligence, might have been discovered in due time, will not hinder the statute of limitations from running. Enough was known to prompt inquiry; there was a clue.

Equity. Decree. Statute of limitations. Before Judge TOMPKINS. Spalding Superior Court. August Term, 1875.

On December 30th, 1874, Craver, as administrator *de bonis non* upon the estate of Peter Farrar, deceased, and the heirs-at-law of said estate, filed their bill against Freeman and Miles G. Dobbins, making, in brief, this case: Farrar died in October, 1864, leaving a large estate of realty and personality; one Josiah Sheffield became administrator, but was removed at the June term, 1872, of the court of ordinary of Spalding county, on account of mal-administration, etc.; Craver became administrator *de bonis non* on January 5th, 1874.

Whilst Sheffield was administrator, to-wit: on January 3d, 1867, he filed his bill against Freeman for an account and settlement of certain cotton transactions and speculations made and entered into by him and Farrar as partners. Freeman answered this bill at the August term, 1869, of Spalding superior court, and a consent decree was then rendered for the complainant for \$1,500 00. On the day of its rendition the decree was paid off in full. Copies of the proceedings in that case were attached.

Since the rendition of said decree complainants have been informed, and so charge, that while the copartnership existed between Farrar and Freeman, one Dobbins was also a partner. This fact was never known to Sheffield, and therefore Dobbins was not made a party defendant to the hereinbefore recited

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bill. Complainants only received this information some twelve or fourteen months before the filing of this bill. Complainants are informed, and believe, that Sheffield was greatly mistaken as to the quantity of cotton held by Freeman, Dobbins & Farrar at the date of the death of the latter. Sheffield alleged in his bill that Freeman had taken possession of some seventy thousand pounds, or other large quantity, of ginned cotton, when in truth, from the statement of facts that has been made to complainants "within a few months past," there were about five hundred bales of cotton averaging five hundred pounds to the bale, purchased by Freeman & Farrar, and about three hundred and sixty bales, same general weight, purchased by Farrar & Dobbins. In all of this cotton Farrar was interested as a partner to the extent of one-third thereof. It was worth forty-five cents per pound, or, in the aggregate, \$193,200 00. The greater part of the cotton bought by Freeman & Dobbins was purchased during the years 1862 and 1863; some of it was bought in the year 1864, but during most of the latter year Farrar was absent from home in the military service of the state. During this period almost the entire management of the cotton business was in the hands of Dobbins & Freeman. The cotton was purchased as an investment, to be held until the close of the late war, to be then sold and the proceeds divided. The larger portion of this cotton was, by contract, left with the sellers to be taken care of and to be delivered on call. Thus it was not delivered until the spring or summer of the year 1865, after the death of Farrar. Freeman & Dobbins sold the same and appropriated the proceeds to their own use, except the sum of \$1,500 00 paid on the aforesaid decree. Other property was appropriated in the same way by the defendants, enumerating it.

A few weeks after the death of Farrar, Freeman & Dobbins went to the house of Sheffield, the former administrator, and by false and fraudulent representations, induced him to sell to Dobbins the interest of his intestate in the cotton on hand, for \$26,000 00 in Confederate money, falsely stating

that his interest amounted only to some thirty-five thousand or forty thousand pounds. At the time of this fraudulent transaction Freeman & Dobbins had in their hands \$40,000 00 of Confederate treasury notes belonging to the estate of Farrar, out of which they made the payment to Sheffield of \$26,000. Sheffield was a weak-minded man, credulous and easily deceived, and from excessive dissipation, easily imposed upon. Freeman, knowing his weakness, together with Dobbins, took advantage of him as aforesaid. Complainants charge that such sale was without authority of law. As an inducement to Sheffield to dispose of the interest of his intestate in such cotton, Freeman falsely informed him that he was about to make the same kind of trade with Dobbins.

Freeman and Dobbins obtained other lots of cotton in which Farrar was interested, and for which they have never accounted to his estate.

The consent decree already alluded to, was fraudulently obtained by unlawful concealments on the part of Freeman & Dobbins, from said Sheffield, as to the amount of cotton really on hand in which the estate of Farrar was interested. It therefore ought to be set aside on this ground, and also because Dobbins was not a party thereto. The case should be reheard with Dobbins before the court, in order that all the matters complained of may be inquired into.

Complainants pray that Freeman & Dobbins may be required to account for all the property of Farrar, deceased, which they have in their hands. Waiving all discovery, they pray the writ of subpoena.

Complainants subsequently filed an amendment in which they alleged that they only acquired knowledge of the fraud perpetrated by Freeman & Dobbins on them and on the former administrator, Sheffield, a few months before the filing of their original bill, and that they immediately "set about taking legal steps for the enforcement of their rights."

The defendants demurred to the bill upon the following grounds:

1st. Because it contained no equity.

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2d. Because the allegations of fraud are too general.

3d. Because any relief for the matters complained of is barred by the statute of limitations.

4th. Because the subject matters complained of are *res adjudicata*, being covered by the decree in the bill set forth.

The demurrer was overruled and defendants excepted.

HUNT & JOHNSON, for plaintiffs in error.

J. M. CAMPBELL, for defendants.

BLECKLEY, Judge.

1. The consent decree rendered and fully performed in 1869, put an end to the controversy as to all matters embraced in that bill. After such length of acquiescence it was quite too late to re-open it without some better excuse than is shown in the new bill. Such a decree is not altogether as subject to review as one not founded on consent: 7 *Georgia Reports*, 110. The new bill does not allege any specific fraudulent act or practice whereby consent on the part of the complainant was brought about to the decree which was rendered.

2. The new bill, as to matters not embraced in the old, is clearly barred if not saved by fraud and the want of knowledge thereof. Even granting that fraud is sufficiently alleged, which, considering the loose frame of the bill, is a large concession, it ought to have been discovered long ago by those representing or interested in Farrar's estate. It is impossible to read the bill without being struck with the absence of explanation why the facts were not ascertained in due time. Reasonable diligence, we think, would have lead to their discovery. Enough was known from the start to prompt inquiry. It is not like a case where there was no clue. The demurrer ought to have been sustained.

Judgment reversed.

N. G. SCROGGINS, plaintiff in error, vs. D. W. HOADLEY, defendant in error.

1. The assignee of a bond for titles to land acquires only the rights of the assignor, and takes the land subject to all the claims of the vendor for the purchase money.
2. Section 3654 of the Code, which authorizes the vendor to make, file, and record a deed to the vendee, and levy a judgment for the purchase money upon the land, when only bond for titles has been given, is very broad, and embraces a case where the plaintiff in the judgment is the transferee of the notes for the purchase money, and the vendor has indorsed them to him. In such case the vendor may make a deed to the vendee, and the land be sold to satisfy the judgment of the transferee of the note; nor does it make any difference that the bond for titles has been assigned and the deed made to the assignee by the vendee, if such assignee took with knowledge that the purchase money had not been paid.
3. Even if the bond for titles obligated the vendor to make a deed to the land so soon as certain payments were made, and certain notes given, and the proof was that these conditions had been complied with, still section 3654 covers the case, and the land, in view of the facts of this case, may be sold under the judgment on the notes for the balance of the purchase money.

Bond for titles. Levy and sale. Before Judge BUCHANAN.
Coweta Superior Court. September Term, 1875.

Reported in the opinion.

P. F. SMITH, for plaintiff in error.

M. J. CLARK; LAVENDER RAY, for defendant.

JACKSON, Judge.

Hoadley sued F. M. Scroggins and obtained judgment against him for \$1,000 00, with interest; execution was issued thereon and levied upon certain real estate. It was claimed by N. G. Scroggins, and the question was whether the land levied on was subject to the *fi. fa.*, or was the property of the claimant. The facts, in substance, were as follows: F. M. Scroggins bought from W. B. W. Dent the estate in question on the following contract: "Received of F. M. Scroggins \$100 00, in part payment for a store-house on Greenville

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street. If the said Scroggins pays \$1,400 00 between this and Christmas, and gives his notes each for \$500 00, due three and six months hence, then the said Dent will make him good and lawful titles to the same;" signed by W. B. W. Dent, and dated December 7th, 1869.

The money was paid, and the two notes were given. These notes were transferred to Hoadley, on which he obtained judgment and levied upon the store-house. Hoadley paid Dent the value of these notes, and Dent indorsed them. F. M. Scroggins, after he had paid the \$1,400 00 and given the two notes, assigned this bond for titles or receipt to N. G. Scroggins, the claimant, and made him a deed to the store. W. B. W. Dent, by the request of Hoadley, the plaintiff, under section 3654 of the Code, made a deed to F. M. Scroggins, and Hoadley then levied upon the store.

On this state of facts the court charged the jury that "if plaintiff's execution was for the purchase money of the property levied on, and if that purchase money was due and unpaid at the time defendant transferred the bond and made a deed to claimant; and if no deed had been made to defendant at the time by W. B. W. Dent, and judgment was obtained afterwards against defendant for the purchase money; and if a deed was made, filed and recorded in the clerk's office of the superior court of Coweta county from W. B. W. Dent to defendant, you should find the property levied on subject to the *fi. fa.*"

The jury found the property subject; and the claimant moved for a new trial on the ground that the court erred in the foregoing charge, and because the verdict was contrary to the law and the evidence. The court overruled this motion, and this is the error assigned.

1. N. G. Scroggins is the assignee of F. M. Scroggins to this bond for titles. He holds the title of F. M. Scroggins. F. M. Scroggins assigned to him all his title but none. His rights and liabilities are those of his assignor, no more, *no less*: *Hind vs. Low*, 38 *Georgia Reports*, 191; *Rawson vs. Coffin*, 55 *Ibid.*, 348.

2, 3. It follows that this store in the hands of the claimant, is liable for the purchase money, if it would have been liable while in the hands of F. M. Scroggins; nor does it make any difference that F. M. Scroggins made a deed to N. G. Scroggins. The latter is no *bona fide* purchaser without notice, but knew all about the title of his vendor, and merely stepped into his shoes. He knew that all the purchase money had not been paid by his vendor; he knew, therefore, that his vendor had no complete equity: 3 *Georgia Reports*, 5; 10 *Ibid.*, 190; 12 *Ibid.*, 464; 40 *Ibid.*, 32; 47 *Ibid.*, 214; 51 *Ibid.*, 502—therefore, he acquired no perfect equity himself. Nor does it make any difference that the bond for titles obligated the vendor to make titles when these notes were given, inasmuch as these notes were for the purchase money. The statute, Code, section 3654, is very broad, and enacts that “when *any* judgment has been rendered in any of the courts of this state, upon any note or other evidence of debt, given for the purchase money of land, where titles have not been made, but bond for titles given, it shall and may be lawful for the obligor of said bond to make, and file, and have recorded in the clerk’s office of the superior court of the county wherein the land lies, a good and sufficient deed of conveyance to the defendant for said land; * * * whereupon, said land may be levied on and sold under such judgment as in other cases.” Nor does it make any difference, in our judgment, that the vendor of the land had transferred the notes to the present plaintiff; especially, as it appears from the record, that he had indorsed them, and was liable for their payment. The statute, (Code, section 3654,) by its terms, includes “*any judgment*” upon “*any note*” given for “*the purchase money of land*,” where bond for titles only is given, and covers this case without stretching it beyond the words used. We think that this land is subject to this debt righteously and equitable as well as legally, and therefore affirm the judgment of the court below.

Judgment affirmed.

Schnell *et al.* vs. Toomer *et al.*

JOHN C. SCHNELL, trustee, *et al.*, plaintiffs in error, vs. FRED-
ERICK A. TOOMER, administrator, *et al.*, defendants in error.

1. An ante-nuptial contract between husband and wife and a trustee, made in 1838, with the declared object of securing the wife's property to her sole and separate use, so that the same should not be liable to the debts or contracts of the husband, and conveying said property to the trustee, in trust for the sole and separate use of the wife for life, and after her death, for the use of her issue, their heirs and assigns, forever, share and share alike; the wife, nevertheless, to have the power of selling and conveying the same absolutely in fee simple, and of passing title thereto by her own deed or bill of sale; and should she die, leaving no issue of her body living at the time of her death, and leaving no will disposing of the property, then, the trustee to hold in further trust for certain designated persons, and their heirs forever, share and share alike; and if the wife should die leaving no issue of her body living at the time of her death, then the property to be held by the trustee in further trust to and for such uses as she might, by last will, direct and appoint, vested the legal title in the trustee, and the same remained in him during the whole period of the coverture, notwithstanding the wife's power to sell and convey the property, she not having exercised the power.
2. Against ejectment brought in 1860 for a tract of land embraced in the trust, the wife suing by her trustee, the statute of limitations would be a defense, and the wife's coverture would be no reply to the statute, inasmuch as the trustee held the title and was competent to sue. If he was barred, she, his *cestui que trust*, was barred, and all for whom, as trustee, he held in remainder.
3. The exclusion of reasonable doubt, in some civil cases, as held requisite in 11 *Georgia Reports*, 160, and 30 *Ibid.*, 619, means no more than that the jury must be clearly satisfied.
4. Where it does not appear that the party holds back evidence within his power to produce, the non-production of more full and definite evidence than he presents, raises no presumption against him; and there should be no charge given to the jury on the subject of such a presumption.

Husband and wife. Trusts. Statute of limitations. Evidence. Presumption. Charge of court. Before Judge HALL. Dougherty Superior Court. October Term, 1875.

Report unnecessary.

VASON & DAVIS; R. N. ELY, for plaintiffs in error.

L. P. D. WARREN, for defendants.

. ATLANTA, JANUARY TERM, 1876.

Schnell *et al.* vs. Toomer *et al.*

BLECKLEY, Judge.

1. This action was commenced in 1860. The statute limitations being pleaded, the plaintiff sought to parry it by coverture of Mrs. Amos; and it was insisted that her antenuptial contract with her husband and her trustee, did not vest the legal title in the latter, so as to subject it to be acted upon by the statute during the time she was covert. The conveyance is a very singular and unusual one. Its terms are sufficiently indicated in the head-note. It will be seen that the trustee was interposed for several purposes; first, to hold off the marital rights of the husband; secondly, to give effect to remainders in favor of her issue, or in favor of other persons in case Mrs. Amos should die intestate and without issue; and thirdly, to execute such uses as she might, by will, direct and appoint. The anomalous feature of the instrument is, that while it declares a trust for her use during her life only, it gives her an absolute power of disposition by sale, and enables her to pass title by her own deed or bill of sale. This power is what is relied upon to clothe her with the legal title, and it seems to be supposed by plaintiffs' counsel that the title passed into the trustee sufficiently to keep the husband's marital rights from attaching, and then returned into Mrs. Amos free from those rights, and upon her death re-vested in the trustee in behalf of the remaindermen. This is a complex theory, and seems to us to be too curly; too much twisted to be good law. The better view of the case is, that the power in Mrs. Amos to sell and convey title should be construed as a simple power to change the investment, the specifics and the form of the trust estate, the proceeds being subject to the like trusts, or else that the mere existence of the power, however deep it might go, would not destroy or suspend the trust, and that nothing short of its actual exercise would have that effect. As there is an express limitation of Mrs. Amos' equitable estate to the period of her natural life, with contingent remainders over, this case differs materially from that of *Cook vs. Walker*, 15 *Georgia Reports*, 457.

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Another suggestion we would make is, that if the legal title was in Mrs. Amos the instant after her marriage was solemnized, it is not by any means easy to see why it did not pass on through her into her husband, and thus she would have had no title whatever at the commencement of this suit. The marriage probably took place in 1838, the year the trust was created, and the adverse possession is not shown to have begun prior to 1853. But we hold that the whole scope and purpose of the trust required it to commence at the execution of the instrument, and continue during the coverture, at least, if not during the life of the wife. And if the power of sale is inconsistent with that construction, it is inconsistent with the estate conveyed; and being a reservation contrary to the grant, and not preceding but following the words of conveyance, it should be deemed subordinate, and, if necessary, be declared void. In our judgment the trustee held the legal title.

2. If the trustee was barred, it is the settled law of this state that the beneficiaries of the trust, for whom he held title, were barred also: 10 *Georgia Reports*, 358; 51 *Ibid.*, 139.

3. In regard to the evidence of adverse possession, etc., the court was requested to charge the jury, as laid down in 30 *Georgia Reports*, 619, that the plea of the statute must be supported by proof so conclusive as to exclude reasonable doubt. The court declined so to charge, but seems to have given what we think is the true meaning of the cases on the subject, namely, that it is only necessary for the proof to clearly satisfy the minds of the jury of the truth of the plea. In civil cases, as in 11 *Georgia Reports*, 160; 30 *Ibid.*, 619 and 17 *Ibid.*, 559, the exclusion of reasonable doubt means that and no more: Code, section 3749; and as "reasonable doubt" is a phrase more appropriate to criminal cases, its employment to instruct the jury in civil cases had best be avoided. There is certainly a difference in the strength of conviction required by the law in the two class of cases; and though being so, it is desirable not to confound in language what should be distinguished in thought.

4. Another request to charge was refused ; it was, in substance, that if the defendants had the means of proving clearly and certainly the date of erecting a certain fence, and its position with reference to the line of the lot in controversy, and had failed to produce the evidence or render a satisfactory reason for not producing it, this circumstance would tend to raise a presumption unfavorable to their case on these points. There was no evidence before the jury that the defendants held back anything in their power. The evidence they produced was not quite certain, but it did not appear that, at the time and under the circumstances, the defendants could have made the matter any more clear. It had been a very long time since the fence was built—over twenty years—and the builders were not before the court. The court was altogether justifiable in refusing the request ; more especially, as the charge given was that the jury must find against the claim of title by prescription unless they were clearly satisfied that defendants, and those under whom they claimed, had been in possession, with written color of title, for more than seven years prior to the suit, holding adversely under claim of right. The fence in question was involved only as related to the fact and date of the possession, and the charge just recited was as favorable to the plaintiffs as that requested, if not more so. As there was no motion for a new trial, we are not called to pronounce upon the sufficiency of the evidence to make out the statutory bar, upon the element of fact. We find no error of law in the record, and consequently affirm the judgment.

Judgment affirmed.

EMANUEL MITCHELL, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

If Mitchell forge the name of Price to a letter, by which money belonging to Price, in the hands of his bailee in Thomasville, is sent by express to Augusta, and if Mitchell, personating one Cousins, to whom he had directed the money to be sent, takes it from the express office and appropriates it

Mitchell vs. The State of Georgia.

to his own use, Mitchell is guilty of forgery under section 4451 of the Code, and such facts sustain the allegation in the indictment that Mitchell's intent was to defraud Price, though Price, afterwards, by suit, recover the money from the express company. The forgery, including the fraudulent intent against Price, was complete when the forged letter moved Price's money from the depository he chose for it, and put it where Mitchell could get it, and where he actually got it and appropriated it; nor does it make him the less guilty of the forgery, that before he could pocket the money, he committed another crime in personating Cousins, nor is his criminal intent to defraud Price lessened by the fact that he also defrauded the express company.

Criminal law. Forgery. Before Judge GIBSON. Richmond Superior Court. April Term, 1875.

Reported in the opinion.

H. CLAY FOSTER, for plaintiff in error.

DAVENPORT JACKSON, by JACKSON & LUMPKIN, for the state.

JACKSON, Judge.

The defendant was indicted for forging a letter, and thereby procuring money to be sent by express to Augusta, with intent to defraud Bill Price. The facts are that he did write the letter and put the name of Bill Price at the end of it; that by so doing he procured the money to be sent by a person in whose hands Price had placed it, by express to Augusta; that he had it sent to Cæsar Cousins, and it came to the express office for delivery to Cæsar Cousins; that defendant personated Cousins and got the money; that Price had to sue for it, and finally recovered it from the company. The jury, under the charge of the court, found defendant guilty. A motion for a new trial was made, on the ground that the verdict was against the law and the evidence, and without evidence; the court below overruled it, and error is assigned on that ruling.

There can be no doubt that the defendant was guilty of personating Cousins, and so getting this money from the express office, and he might have been indicted and convicted of

that crime. But is he not guilty of forgery? Does not the transaction show that he was guilty of the latter offense before he had committed the former? Let us see. Section 4451 of our Code enacts that if any person shall fraudulently make, sign, forge, counterfeit, or alter any writing, with intent to defraud any person, he shall, on conviction, be punished, etc.

Well, Mitchell signed and forged the name of Price to this letter—a writing. With what intent? Evidently to defraud. Whom? When he wrote the letter, whom did he intend to defraud? Whose money was he scheming to pocket? Unquestionably Price's money. He had ascertained that Price had the money in the hands of a person in Thomasville; he forged a letter in Price's name to this person; he had the money sent by express to Cousins, and he went to the express office and got it out. The express company was not in his thoughts when he forged the letter, or if it was, it was the mere instrumentality by which he was contriving to get Price's money; he had no intent to defraud that company; if he did he certainly intended to defraud Price too; it was not his intention to defraud Cousins, for it was not Cousins' money he was planning to get. But he did intend to defraud Price; and what is more, he succeeded in his intent, and did defraud him. He put in his pocket Price's money and appropriated it to his own use. It is true Price got it by suit out of the express company, but it took time, fees to counsel, trouble, expense and delay to get it out of that company—all of which this forgery caused. We hold that Price had a right to keep his money in Thomasville, and if defendant, by forging a letter and signing Price's name to it, got the money sent to Augusta, and pocketed it; that if he only kept it one hour from Price, with intent to apply it to his, the defendant's, own use, the crime of forgery is complete; the intent is demonstrated to defraud Price by the fact that he wrote the letter and reaped the fruits of the writing. We do not think that this case is at all affected by 51 *Georgia Reports*, 535. The principle there ruled is that the person intended to be defrauded must be designated in the indictment. It is done here, and moreover,

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we think it is clearly and satisfactorily proved. The verdict is in accordance with the law and abundantly supported by the facts.

Judgment affirmed.

THOMAS P. SAFFOLD, plaintiff in error, vs. JAMES A. WADE, executor, defendant in error.

1. Where the verdict is against both of the defendants sued, and finds one of them to be security only, a judgment entered up against "the defendant," is to be construed as including both, the omission of the letter "s" at the termination of the word *defendant*, being an immaterial clerical error. The judgment is not void by reason of failing to describe the security as security, but is amendable.
2. Where, upon an execution against both defendants, the sheriff entered a levy, in due time, as made upon the property of one, (naming him,) the entry kept the judgment from becoming dormant as to either, for seven years from the date of the levy.
3. After such a levy had been disposed of by selling the property and paying out the proceeds to older *fi. fas.*, it was competent, by leave of the court, to amend the judgment by inserting therein the letter "s" and the name of one of the defendants as principal, and the name of the other as security, so as to make the judgment, in that respect, conform to the verdict. And it was competent, by like leave of the court, at the same time, to amend the *fi. fa.* by designating therein one of the defendants as principal and the other as security, thus making the *fi. fa.* conform to the judgment as amended.
4. It was no obstacle to making these amendments that an affidavit of illegality, interposed by the security, had previously been sustained, and a levy upon his property dismissed, the grounds of illegality insisted upon being the variances between the verdict and the judgment, and between the judgment and the *fi. fa.*, which the amendments served to obviate.
5. Such amendments were favorable to the security, being chiefly in respect to matters intended by the law for his benefit. They were, moreover, warranted by the record, which imports absolute verity. That they were made without notice to him is, consequently, nothing to his prejudice. Before they were made, he complained by affidavit of illegality, of the defects which they remedied, and, by so doing, virtually demanded the correction of said defects, the same being amendable.
6. As between the parties to the action, amendments to the judgment and *fi. fa.*, made to establish conformity in the whole record, relate back, gen-

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erally, and for most purposes, to the original dates, and take effect therefrom.

7. After a proper order to amend a judgment and *fi. fa.*, it is not requisite to enter a new judgment or issue a new *fi. fa.*
8. Affidavit of illegality by the security being made, upon the grounds that no legal judgment was entered, that the verdict and judgment were dormant, and that no legal execution was issued, was properly overruled—the levy and the affidavit of illegality being subsequent to the proceedings and amendments indicated in the foregoing notes, and within two years after the levy on the principal's property referred to in note second.

Judgments. Verdict. Amendment. Principal and security. Illegality. Before Judge BARTLETT. Morgan Superior Court. September Term, 1875.

Reported in the opinion.

MCCAY & TRIPPE; A. G. & F. C. FOSTER, for plaintiff in error.

BILLUPS & BROBSTON, for defendant.

BLECKLEY, Judge.

1. The verdict of the jury was against both of the defendants. The suit was upon a promissory note signed by both, apparently as principals, but one of them seems to have made proof of his suretyship for the other, and the jury found that he was security only. He is the plaintiff in error. In signing judgment upon the verdict, neither of them was named, the judgment being simply against "the defendant." Execution issued against both defendants, and as the verdict was against both, the judgment was, no doubt, intended to be, and should be so construed. The omission of the letter *s* was, we think, a clerical error, and wholly immaterial. If it had been the purpose to sign judgment against one defendant only, the one intended would have been named. The word *defendant* applies equally to each, and may include both. Even in statutes, the singular may stand for and represent the plural: 4 *Georgia Reports*, 399. The verdict subjected both defendants alike to pay the debt, and it violates every principle

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ability to suppose that the judgment was intended to be against one only. The plain and obvious truth is, that by the word *defendants* was written *defendant*. It was a grave matter not to have described the security as such a judgment, but as he did not sign the note in that character it is possible that the Code, sections 2159, 3572, does not require it. Comparing the terms of these two sections with themselves and with the prior statutes (Cobb's Digest, §§ 598, 600,) I am inclined to think it does not; more especially, as sections 2165 and 2166 seem to treat the creditor altogether disinterested in the question of suretyship, where the fact does not appear on the face of the contract. But, in any event, the omission did not make the judgment void. It was, at most, an irregularity, and was amendable. See 26 *Georgia Reports*, 162; 27 *Ibid.*, 353; 53 *Ibid.*, 387; 54 *Ibid.*, 194.

2. The execution being against both defendants, was levied upon the principal's property in less than seven years after the judgment was rendered. That kept the judgment from becoming dormant for seven years longer: Code, section 2914; 10 *Georgia Reports*, 184. The levy was entered by the sheriff, the officer authorized by law to execute and return the writ, and that preserved the vitality of the judgment against both defendants. The case in 13 *Georgia Reports* 269, does not conflict with this ruling, for in that case the last entry was more than seven years old when the *fi. fa.* was re-levied, and the circumstance relied upon to prevent dormancy was litigation upon a bill in chancery to which the co-defendant in the *fi. fa.*, who claimed that the judgment become dormant was no party. Here the requisites of the statute were literally fulfilled; there was an entry in time by the proper officer.

3. The property levied upon was sold, and the proceeds distributed to older *fi. fas.*, after which the amendments were made which are indicated in the third head-note.

4. Before they were made, however, the *fi. fa.* was re-levied upon the property of the security (now the plaintiff's).

error,) who filed an affidavit of illegality on the grounds of variance between the verdict and judgment, and between the judgment and *fi. fa.*, and on the further grounds that the debt was created for slaves, and that an issue tendered by the principal under the relief laws was yet undisposed of. The last two grounds were not insisted upon in the argument here as of any value. On the trial of the affidavit of illegality it was sustained, and the levy was dismissed by the court. The plaintiff then, at the same term of the court, procured the passage of orders to make the amendments in question, and they were made. It is insisted that it was not competent to make the amendments after the illegality was sustained, and that the judgment pronouncing the execution illegal is still unreversed, wherefore the execution stands condemned, down to the present time, as illegal. But the only grounds of illegality now insisted upon as effective were those which complained of the very defects which the amendments remedied. The judgment was not void—it was amendable by law; and no judgment with any life in it can be slain by an affidavit of illegality. So, too, the *fi. fa.* was, at most, only irregular—it was not void—it was amendable. An affidavit of illegality cannot destroy a *fi. fa.*, any more than a judgment, for irregularity. All it can do is to obstruct its enforcement until the irregularity shall be cured by amendment, or until it shall be too late to amend. Between a prior affidavit of illegality based on irregularities, and subsequent rectification of those irregularities by amendment, is the most perfect consistency. And the judgment sustaining such an affidavit is conclusive of but one thing, to-wit: their then existence as legal obstacles to the enforcement of the *fi. fa.* If such obstacles are once formed and adjudicated upon, are they thereby rendered fixed and permanent? Surely not. On the contrary, after such a demonstration of their existence and of the necessity for removing them, they should be removed at once; and that was done in this case.

5. It is urged that the amendments were void because made without notice to the security. All of them, except

adding the letter *s* to the word defendant, which was quite useless and unnecessary, were favorable to his interest and intended by the law for his benefit. What cause could he have shown against them? They were based on no extrinsic evidence, but were warranted by the record itself. There was nothing to do but inspect the record and order accordingly: 1 *Kelly*, 559; 3 *Ibid.*, 121. His liability for the debt was already fixed by the verdict and by the judgment as rendered. Nothing was added to that liability by the amendments. Besides, he had resisted the enforcement of the *fi. fa.* because of these defects, and they being, in law, amendable, his affidavit of illegality setting them up and insisting upon them, may well be deemed a demand, on his part, for their correction. The plaintiff merely responded to that demand by moving the amendments after they had, at his instance, been adjudged necessary.

6. The amendments, when made, related back, as between the parties, and for most purposes, to the original dates of judgment and *fi. fa.*: 5 *Georgia Reports*, 251; 11 *Ibid.*, 281; 13 *Ibid.*, 218; 18 *Ibid.*, 287.

7. It was not requisite to enter a new judgment or issue a new *fi. fa.* Dormancy of the judgment did not, therefore, result from making the amendments after the lapse of seven years from the date of the judgment. The benefit to the plaintiff of the entries on the *fi. fa.* were not lost, as means of preventing dormancy. In whatever mode the amendments were made, the identity of the originals would not be destroyed as long as, with the aid of the orders authorizing amendment, the difference between the former and the present reading could be accurately shown. The record before us will bear this test, as it contains a copy of the judgment and *fi. fa.* as they were before amendment, and a copy of what they became by amendment. No authority was produced to us in the argument on the precise point as to how amendments should be made; that is, how the new matter should be combined with the old. Doubtless, some little research among books of practice would lead to satisfactory rulings on the

subject. We find one decision on amending pleadings in equity in 25 *Georgia Reports*, 634, which holds that an order to amend does not, of itself, operate as an amendment. It also points out how bills are amended, but in such brief terms as to be scarcely perspicuous. In 35 *Georgia Reports*, 207, instead of amending the *fi. fa.* it was quashed, and a new one ordered to issue, but there was no motion to amend the *fi. fa.*, the *judgment* only being the subject of that motion.

8. The illegality now under review was an affidavit filed by the security in resistance to a second levy made upon his property, which levy was after all the foregoing proceedings and amendments took place. It was, however, within two years after the levy on the principal's property, referred to under the second head of this opinion. Some of the grounds of illegality are not stated with entire clearness, but the substance of them all is comprehended in these propositions: that no legal judgment was entered; that the verdict and judgment are dormant; and that no legal execution has issued. The court below overruled the affidavit, and that is the error complained of. After what has been said, our reasons for affirming the judgment are apparent. We think all possible irregularity had been eliminated from both the judgment and *fi. fa.*; that the judgment was not dormant, and that the execution, as amended, was valid. Let it proceed.

Judgment affirmed.

CHARLES R. STONE *et al.*, executors, plaintiffs in error, vs.
JOHN S. DAVIDSON, assignee, defendant in error.

1. Suit against a bank and notice by publication to the stockholders, under sections 3371-2-3, of the Code, in 1866, with judgment and execution and return of "*nulla bona*" against the bank, and execution thereupon in June, 1869, against a stockholder, with return of "*nulla bona*" in July, 1869, will prevent the bar of the statute of limitations of 1869 from attaching. The suit against the stockholder began not later, at least, than the issue of the execution against him, though no levy was made upon his property until June, 1870.

Stone *et al.* vs. Davidson.

2. The fact of notice by publication under section 3371, need not appear of record; nor need it appear of record that the president of the company furnished a certificate of the stockholders, and the number of shares owned by each at the time the judgment was rendered against the corporation, under section 3373. It is enough that these facts exist; if they do not exist, and the *fi. fa.* is for too much or otherwise illegal, the remedy of the defendant is by affidavit of illegality.

Banks. Stockholders. Statute of limitations. Illegality. Before JOSEPH B. CUMMING, Esq., judge *pro hac vice*. Richmond County. At Chambers, July 23d, 1875.

Reported in the opinion.

WILLIAM T. GOULD; FRANK H. MILLER; W. H. HULL,
for plaintiffs in error.

J. C. C. BLACK; H. D. D. TWIGGS, for defendant.

JACKSON, Judge.

The plaintiff, Davidson, as assignee, held a judgment against the Mechanics Bank rendered in 1867. On this judgment, execution issued against Metcalf, as one of the stockholders of the bank, on the 16th of June, 1869. A return of *nulla bona* was made upon this execution, on the 13th of July, 1869, and a levy was made on the 8th of August, 1870. Affidavit of illegality was made on the ground, mainly, that the levy of this *fi. fa.* was the commencement of the suit against Metcalf; that this levy bore date after the 1st of January, 1870; that the debt was contracted, it being the issue of bank bills, before the 1st of June, 1865, and that therefore the statute of limitations of 1869 barred the right of action against Metcalf. The court below held that Metcalf's estate was not protected by the bar of that statute, and error is assigned thereon.

The execution against Metcalf, a stockholder of the bank, was issued by authority of section 3372 of the Code, which provides that it may be done after judgment against the bank, if notice by publication had been given one month after the

suit was commenced against the bank, according to section 3371, and a return of *nulla bona* made on the *fi. fa.* against the bank. The first question is, whether this notice by publication provided for in section 3371 of the Code, is the beginning of suit against the stockholder?

1. That section declares that publication under it shall operate as notice to each stockholder, "*for the purposes hereinafter mentioned.*" What are these purposes? The next section declares that when this notice is thus given, execution shall first be issued against the corporation, and upon a return of no property, then the clerk shall issue execution against the stockholder on the application of the plaintiff or his attorney, for his ratable part of the debt; and to ascertain that ratable part, it is made, by the next section, 3373, the duty of the president of the corporate body to furnish a list of stockholders and the number of shares owned by each under certain penalties therein imposed, upon the president. The next section, 3374, provides that any stockholder may defend, if he wishes, and if the president shall refuse or fail to do so. By the next section, 3375, the defendant or defendants are allowed the remedy of affidavit of illegality as in other cases. It may well be doubted whether it was not the intention of the law-making power, by these statutes, to make this publication the beginning of the suit against every stockholder. It is within the power of the general assembly to prescribe what sort of service these defendants shall receive to bring them into court and to bind them. It is by these sections of the Code enacted, that the publication shall so operate upon them that such a judgment may be rendered as shall authorize the issue of execution against them individually to the extent of their stock. It is further enacted that they can come in and defend. A snap judgment is thus provided against. In *Hard vs. Sibley*, however, this court has reasoned to the effect that the issue of the execution, and not this notice by publication is the beginning of a sort of new suit against the stockholder, and we will not interfere with that ruling or *dictum*. Indeed, this case does not require us to decide that point. The

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execution was issued here before the 1st of January, 1870, and a return made thereon. We know of no law requiring that execution to be levied within a certain time, at least, within a period less than seven years from the judgment, to keep it operative. The execution was alive, active, operative, before the bar of the statute of 1869 attached, and we hold that suit was commenced against him, under these acts, not later than the date that the *fi. fa.* issued against him individually. And this is in accordance with the ruling, or at least the reasoning in *Heard vs. Sibley*, 52 *Georgia Reports*, 310. Nor is the answer that there can be no notice without levy, conclusive. There may be a levy without notice, and the notice by publication, one month after the bank was sued, should have kept the stockholder on the alert, as on that judgment execution might issue against him. At all events, the *dictum* in *Heard vs. Sibley* is that the execution is a mode of commencing the suit, and we shall follow that in this case.

2. It was further objected that there is no record evidence of the fact of the notice by publication, nor of the amount of Metcalf's stock, and the other stock, so as to fix his *pro rata* liability on the *fi. fa.* against him. The statute does not require record evidence of the notice by publication; if the notice was not given, the judgment does not bind this defendant, and he can take advantage of it by affidavit of illegality. In this case it is admitted that the publication was made, and notice thus given. We are not at liberty to enlarge the statute, and require record evidence of the fact. Nor does the statute require that the record shall show the stockholders and their shares so as to afford record evidence that the execution against the stockholder is for the right amount. On the contrary, section 3373 makes it the duty of the president of the corporation to give the information of the number of stockholders and the shares of each to the attorney of the plaintiff, and that information in the shape of a certificate, under oath, and upon this certificate the clerk of the court is to issue the execution against the stockholder. If this has not been done, the remedy is by illegality. On the whole, we see no error in

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the decision of the court below overruling the illegality, and we affirm the judgment.

Judgment affirmed.

J. G. BAILIE & BROTHER, plaintiffs in error, vs. GEORGE G. MCWHORTER *et al.*, defendants in error.

1. Where a will provides that the trustees shall hold and employ the property in trust for the sole use and benefit of the testator's son, during his life, permitting him, in the discretion of the trustee, to have such control over the property, and such only, as may be compatible with preserving the same unimpaired for the maintenance of the son, *free from all liability for any of his debts or contracts*; and in further trust, to dispose of the estate, on the death of the son, as the son, by last will, may direct and appoint; and, in default thereof, to hold in trust for the son's widow and children, if any he shall leave, share and share alike; and if none, then to divide the estate equally between the trustees of other trust estates created by the same will in behalf of other beneficiaries—the income of the property accruing during the life of the son is subject, in equity, to a debt contracted by him while managing the trust estate, for necessary supplies for himself and family, and for the use of the trust estate, the debt having been reduced to judgment, and the execution thereon having been returned *nulla bona*.
2. The trustee being dead and no successor appointed, a proper mode of securing the income for application to the debt, is to appoint a receiver: *24 Georgia Reports, 52.*
3. The wife and children of the debtor are not necessary or proper parties to the bill, he alone being interested in the income.

Trusts. Equity. Receiver. Debtor and creditor. Parties. Before Judge TOMPKINS. Richmond Superior Court. October Term, 1875.

The facts are sufficiently stated in the first head-note.

HARPER & BROTHER, for plaintiff in error.

W. H. HULL, for defendants.

BLECKLEY, Judge.

1. The court dismissed the bill, on demurrer, for want of equity. The defendant contends, not that the complainants have a common law remedy, but that they have no remedy at all. He insists, through his learned counsel, that the trust is executory, and falls within the case of *Edmondson vs. Dyson*, 2 *Kelly*, 307. On account of the executory character of the trust he denies that the rule announced in *Gray vs. Obear*, 54 *Georgia Reports*, 331, that a trust estate cannot be created for the sole benefit of a full-grown man, who is *sui juris*, applies. We can, for the purposes of the present case, concede these positions as to the *corpus* of the property, and still allow the complainants to proceed against the income. Beyond all dispute, the whole income during the life of the defendant belongs to him. And if so, it ought to be applied in equity to the complainants' claim, which is, according to the allegations of the bill, for necessary supplies sold to the defendant (whilst he was in the management of the trust estate,) for himself and family and for the use of the trust estate. We do not rule positively that the life estate in the *corpus* would not be subject to such a debt. That may remain an open question. The defendant insists that it is not; and that much may be yielded without defeating the complainants, inasmuch as it appears from the bill that the income is considerable; and we are well satisfied it accords better with the scheme of the will to spare the *corpus* and encroach upon the income only, whilst the latter is sufficient for the purpose.

2. Were there a trustee in possession he might be directed by the decree to pay out the income as it accrues, to the complainants, until their judgment was discharged: 24 *Georgia Reports*, 52. But there being no trustee the object may be accomplished by the appointment of a receiver. Thus, equity is not deficient in the means of administering appropriate relief in the case.

3. There was a special demurrer for misjoinder of parties,

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the wife and children of McWhorter, the tenant for life, being joined with him as co-defendants. The court below made no ruling on that question, but we were requested in the argument to express our opinion upon it. As the cause will proceed to subject the income alone, McWhorter will be the only proper defendant, his wife and children not being interested in the income, simply in a contingent remainder in the *corpus*.

Judgment reversed.

KIMBRO & MORGAN, plaintiffs in error, vs. THE VIRGINIA AND TENNESSEE AIR-LINE RAILWAY COMPANY, defendant in error.

1. An order of the court in these words: "Upon motion of defendant's counsel, ordered that this cause be dismissed upon the ground that the allegations in the petition do not make a case upon which plaintiffs can recover," is a judgment of the court upon demurrer to the declaration, and operates as a complete bar to a second suit for the same cause of action, and may be pleaded as "*res adjudicata*" thereto.
2. If it did, the plea of "*res adjudicata*" would bar the second action and any legitimate amendment thereto; and if the amendment set out a new and distinct cause of action, it would not be received and allowed as an amendment, but if it could be so allowed, the statute of limitations would run against it from the breach of the contract to the date of the amendment.
3. Such judgment on demurrer and dismissal of plaintiffs' action consequent thereon, is not included in section 2932 of the Code, so as to authorize the plaintiff to renew his action within six months, and to make the renewed case stand upon the same footing as to limitations with the original case.

Judgments. Demurrer. Practice in the Superior Court. Pleadings. Amendment. Statute of limitations. Before Judge BUCHANAN. Troup Superior Court. November Term, 1875.

Reported in the opinion.

BIGHAM & WHITAKER; SPEER & SPEER, for plaintiffs in error.

Kimbrow & Morgan vs. The Virginia, etc., Railway Company

A. W. HAMMOND & SON, by JOHN L. HOPKINS
FERRELL, for defendant.

JACKSON, Judge.

At the November term, 1867, of the superior court county of Troup, the plaintiffs sued the defendant, as mon-carrier, for the violation of a contract to deliver stock of goods at LaGrange, Georgia, from Philadelphia where they were bought. The suit was begun by attachment and a declaration in assumpsit was filed thereon under order. At the November term, 1869, the case came on for trial. It appears that some evidence was introduced by the plaintiffs but the case went off on demurrer to the declaration, and appears from the following order passed by the court: "motion of defendant's counsel ordered that this cause be dismissed upon the ground that the allegations in the petition do not make a case upon which plaintiffs can recover."

The case was brought to the supreme court and dismissed on the ground that the record and bill of exceptions were not transmitted to this court, and the judgment of the superior court was affirmed. This judgment was entered on the minutes of the court below at November term, 1870. (On the 5th of July, 1870, another attachment was sued out, on which another declaration, just like the first, was filed. This declaration was amended at the November term, 1872.

Defendant pleaded *res adjudicata* as to the declaration filed in 1870, and the statute of limitations as to the amended declaration. Plaintiffs introduced in evidence the bill of exceptions in the former case, wherein this judgment of dismissal is set out, and Kimbro, as a witness to the contract breach and the damages thereon. The defendant introduced no evidence.

The court charged the jury that the case had been adjudicated, as appears from the bill of exceptions, and also that the amended declaration was filed four years after the cause of action accrued, then that the plaintiffs could not recover.

jury found for the defendant; the plaintiffs moved for a new trial on the ground that the charge of the court was erroneous and the verdict against the law and the testimony; the court refused to grant the new trial, and this is the error assigned.

1. The judgment of a court upon demurrer to the declaration is a final disposition of the case. The demurrer admits all the allegations in the declaration to be true. The plaintiff can prove only the allegations which he sets out in his declaration. The demurrer, therefore, admits the whole case of the plaintiff, and makes the issue in law upon the case that, admitting it all to be just as he says, the law will not allow him to recover. A judgment rendered thereon by the court is just as conclusive as a judgment rendered by the same court on facts found by the verdict of a jury. In the one case the jury finds the facts to be true; in the other, the defendant admits them to be true; in either case the judgment of the court is the sentence of the law upon the facts. Was this order a judgment of the court upon the allegations made in plaintiffs' declaration? It affirms that it was. It is, therefore, a judgment rendered on all the admitted facts, and concludes the plaintiffs' case. We think, therefore, the charge right, if this case be the same as that which went off on demurrer in the former suit. The cases seem to be identical and *res adjudicata* was well pleaded.

2. In respect to the charge on the statute of limitations, we think the court also right. If the amendment made a new cause of action and could have been engrafted on the original declaration at all, the statute of limitations ran from the time that the cause of action accrued up to the time that the amendment was filed. If it was not a new cause of action we do not see how it could vary the substance of the original declaration so as to prevent the judgment rendered on that declaration from making a case of *res adjudicata*, and thus concluding the plaintiffs. In any event, we think the case with the defendant, the charge of the court right and the verdict in accordance with the law and the testimony.

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Nor do we think that section 2932 of the Code, which provides that "If a plaintiff shall be non-suited, or shall discontinue or dismiss his case, and shall recommence within six months, such renewed case shall stand upon the same footing, subject to limitation, with the original case; but this privilege of dismissal and renewal shall be exercised only once under this case," is applicable to a case dismissed by the court on demurrer. The words "but this privilege of dismissal," and the words "dismiss his case," evidently mean where the party plaintiff himself exercises the privilege of dismissing his case, and not where the court dismisses it on demurrer. In so far as the Code conflicts with the act of 1847, that act is repealed. It is scarcely necessary, however, to decide this point, as the case is controlled by the other points hereinbefore adjudicated.

Let the judgment be affirmed.

STURGIS & BERRY, plaintiffs in error, vs. FRANCIS A. FROST, defendant in error.

1. The tenant is not obliged to replevy, disputing the rent by affidavit and giving security for the eventual condemnation money, and then wait for judicial determination of the controversy, in order to entitle him to commence an action against the landlord for suing out a distress warrant maliciously, and without probable cause, and for having the same levied upon his goods.
2. Distress warrant, unresisted, is final process of itself: *34 Georgia Reports*, 178. After levy, it is more in the nature of a suit terminated than of a pending.
3. Where the warrant issues before the rent is due, on the ground that the tenant is seeking to remove his goods from the premises, can he replevy? See Code, sections 2285, 4083; *23 Georgia Reports*, 43.
4. Damage to business, or the loss of profits, sustained after commencement of the suit, can form no part of the recovery.
5. The average profits which a tradesman was making when his entire stock was seized, may be considered in estimating his damage for the time during which the stock was detained from him, and his profits are not to be computed. Although the profits, as such, would not be lost.

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recoverable, yet their amount, as a fact, may be considered in estimating the magnitude of the alleged outrage by defendant.

6. Expenses of setting the stock aside as exempt under the homestead and exemption laws, are not recoverable as damages.

Landlord and tenant. *Torts*. Distress warrant. Damages. Before Judge CRAWFORD. Troup Superior Court. November Term, 1875.

Reported in the opinion.

W. W. TURNER; FERRELL & LONGLEY, for plaintiffs in error.

SPEER & SPEER; ALBERT H. COX, for defendant.

BLECKLEY, Judge.

A landlord sued out distress warrant against his tenants for rent, and had the same levied upon their goods. The affidavit upon which the warrant issued showed on its face that the rent was not due, but alleged that the tenants were seeking to remove their goods from the premises. The goods consisted of a stock in trade, and they remained some weeks in the custody of the sheriff, who advertised them for sale under the levy. The defendants procured them to be set apart by the ordinary as exempt property under the homestead and exemption laws, and the sheriff surrendered them as the result of that proceeding. Thereupon, the tenants commenced their action against the landlord for suing out the distress warrant maliciously and without probable cause, and for having the same levied, alleging in the declaration, that the landlord's affidavit, in so far as it charged them with seeking to remove their goods from the premises, was untrue; and making divers averments as to damages, etc.

At the trial, the presiding judge non-suited the plaintiffs, the ground of the motion for non-suit being that the action was prematurely brought, it not appearing that the distress warrant proceedings were at an end.

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What proceedings are pending on the distress warrant? The record discloses none. The property seized has been sold and surrendered. No second levy has been made, and the warrant, if still alive, has ceased to be active. The law contains no provision for contesting any distress warrant direct-ly except by replevying the goods: Code, section 4083. Where there are no goods to replevy, no contest is possible. Therefore, all proceedings which have taken place on the distress warrant are not ended, there is no way to end them. They have reached a point where they must endure till time shall be no more, or until some new statute shall be passed to move them forward and terminate their existence.

But it is said that the tenants could have replevied, and, by affidavit, made an issue for trial by the proper court, and that not having done so while the levy was pending, they voluntarily waived their opportunity to lay a foundation for the present action. If this argument were sound it would not prove that proceedings are still pending, but only that a certain possible proceeding never took place. But we cannot sanction the doctrine that if a landlord maliciously and without probable cause, levies a distress warrant upon his tenant he is forever secure against an action for damages, unless the tenant will contest his claim at the cost of giving security for the eventual condemnation money. The Code does not provide for litigating the warrant on any other terms. A mere affidavit disputing the rent will not do; the property must be replevied, and in order to replevy the eventual condemnation money must be secured. This being so, if the tenant is unable to give the security he is at the mercy of the landlord. However groundless the claim, the property must sell; if it be true that no action for malicious and unfounded distress can be brought unless the sale is arrested, the tenant is without remedy. Such a rule of law as this would imply gain recognition only by being vouched upon incontrovertible authority.

2. Distress warrant, considered as a suit, is both begun and ended. It is, of itself, final process, and has no pro-

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in any court: 34 *Georgia Reports*, 178. It stands to a suit proper as a guerrilla to a regular soldier, or as a privateer to a ship of the line.

3. What has been said in reference to resisting a distress warrant by any means at all, even upon the hard condition of securing the creditor, applies to a warrant issuing for rent claimed to be due. The Code seems to provide literally for no other case. Its language is (section 4083,) "that the party distrained may in all cases replevy the property so distrained by making oath that the sum, or some part thereof, distrained for is not due, and give security for the eventual condemnation money," etc. The oath here prescribed would not fit a proceeding where the rent was avowedly not yet due. If the tenant had no point to make on the amount of the rent, but simply on the alleged purpose of removing his goods from the premises, could he vary the affidavit accordingly? In view of a decision of this court long ago made, excluding the defense of set-off because not covered by the verbiage of the statute, a doubt might well be entertained on this question: 23 *Georgia Reports*, 43.

4, 5, 6. The court made certain rulings upon the admissibility of testimony, which we dispose of as indicated in the head notes.

We express no opinion on other elements of the case further than to say that we think the jury ought to have been allowed to pass upon the facts, under proper instructions from the bench as to the law.

Judgment reversed.

THE DALTON AND MORGANTON RAILROAD COMPANY
et al., plaintiffs in error, *vs.* HENRY T. MCDANIEL *et al.*,
 defendants in error.

1. Equity will compel the payment of a sufficient per cent. of unpaid stock subscribed, to pay the debts of a corporation; and a bill brought against the stockholders to that end is the proper remedy.

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2. The fact that the stockholders agree in their contract to pay such per cent. as the directors shall call for, does not change the remedy and require the creditors to apply for a *mandamus* against the directors to do their duty under the contract; the remedy in equity is more complete, and is the only appropriate and adequate remedy, where the bill alleges that the directors refuse to call in and collect the stock subscribed, and also that many stockholders are insolvent, and some dead, and some beyond the jurisdiction, and that the debts are of various amounts and due to many creditors; the powers of a court of equity to adjust all the equities, audit the debts, and fix the per cent. upon the solvent stock necessary to pay the debts, are peculiarly adapted to the exigencies of just such a case.
3. Process which commands the attendance of the defendants at court on a certain day, under penalty of the law, is valid; service of the bill by private persons with affidavits annexed, verifying such service, is legal; and if such process and service were irregular, such irregularity would be cured by appearance, demurrer and answer.
4. After defendants are fully heard on demurrer to the whole bill, and the demurrer for want of equity has been overruled, and the answers have been filed, and the case has gone to an auditor and his report has been filed and excepted to, and the case is pending on the exceptions, it is too late to move to dismiss the bill.

Equity. Process. Service. Corporations. Stockholders. *Mandamus*. Practice in the Superior Court. Before Judge McCUTCHEM. Whitfield Superior Court. October Term, 1875.

Reported in the opinion.

JOHNSON & McCAMY; SHUMATE & WILLIAMSON; W. H. BROOKER; WILLIAM PHILLIPS; R. F. LYON, by McCAY & TRIPPE, for plaintiffs in error.

D. A. WALKER; W. K. MOORE; T. R. JONES, for defendants.

JACKSON, Judge.

This bill was brought by H. T. McDaniel in behalf of himself and many others, who were duly made parties complainants, as creditors of the Dalton and Morganton Railroad Company, to compel Samuel M. Carter and a great many others, amounting to several hundred, stockholders of said

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company, to pay in a sufficient amount of the stock subscribed by them, to satisfy certain judgments and debts which said company owed complainants. The bill alleged that the said McDaniel had obtained judgment for \$3,404 17, besides interest and costs, on which execution had issued with a return of *nulla bona* thereon; that said corporation had ceased to work for two years and had abandoned all efforts to carry out the objects of its incorporation, and that it had no property except the subscriptions for the capital stock, and which subscriptions the directors refused to call and collect in, because they are unwilling to force the subscribers to pay the debts of the corporation.

They set out the contract in writing by which said stockholders had agreed to pay from \$1,000 00 to \$100 00 each, in such installments as might be assessed from time to time by the directors, provided they were not called upon for over thirty-five per cent. of the amount subscribed per annum. That all of the sums subscribed are now due, that some of the subscribers are dead, some are unable to pay, and that the burden must fall on those able to pay, and all are made defendants to equalize this burden according to equity. That the directors have called for only twenty-five per cent. of the amount, and all they have collected has been paid out to others, leaving complainants unpaid.

The prayer is, that they may be compelled to pay such a per cent. as shall be necessary to pay the debts of the corporation.

The subpoena required the defendants, under penalty of the law, to appear at the superior court of Whitfield county on the first Monday in April next, to answer the bill, and abide the decree, or in default the court will proceed as to justice shall appertain.

Witness, Hon. C. D. McCuthen, judge of said court, dated 2d of January, 1874, and attested by the clerk.

The service of this bill was acknowledged by many of these defendants; others seem to have answered by counsel; others were served, some by the sheriff, and others by private per-

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sons, with affidavits of service duly attached to the bill and subpoena.

At the return term of the bill, to-wit: at the April term, 1874, an agreement was entered of record, that the defendants, pending negotiations for settlement and the adjustment of equities between the counties interested, should have until the October term, 1874, to demur and answer, and that said October term be considered as the appearance term of the bill. This agreement was signed by counsel for the complainants, and for the stockholders of Fannin county, and Gilmer county, and the stockholders generally.

At said October term a demurrer was filed to the said bill by all the stockholders who had been served, or had acknowledged service, upon the grounds: First. That it did not appear that any of the defendants resided in Whitfield nor in what county they did reside; second, that the bill was improperly brought against defendants jointly; third, because the bill is multifarious; fourth, that the charter requires the directors to call in the stock and the contract obligates the defendants only to obey such call, and therefore the court has no right to assess the per cent. that defendants shall pay; fifth, because complainants have a complete remedy at law; sixth, that their private property and persons are not liable for these debts; and seventh, because there is no equity in the bill.

The presiding judge having been a stockholder, but having assigned his stock, it was agreed that he should preside. This demurrer was overruled, the bill being amended so as to show the jurisdiction of the court.

At the April term, 1875, an auditor was appointed, who made his report at the October term of the same year, answers having been filed by many of the defendants—all, it seems, who had been served—before the appointment of said auditor. The report of the auditor was entered on the minutes, and parties allowed time to except thereto.

Amendatory answers were filed at the same term by many of the defendants, and a return of *non est inventus* made

nunc pro tunc by the sheriff of Whitfield county as to defendants not served. Defendants moved at the same term to dismiss the bill: First, for want of equity; second, because there is no legal subpoena; third, because, there is no legal service. The court overruled the motion to dismiss; at the same time defendants excepted to the master's report upon substantially the same grounds as the motion to dismiss; the court overruled these exceptions, and error is assigned here on the refusal to dismiss on the three grounds above set out.

1, 2. We think that there is equity in this bill: Code, sections 3367, 1688, 1946; 8 *Georgia Reports*, 486; 35 *Ibid.*, 170; 4 *Ibid.*, 319; 3 *Ibid.*, 449. It is not necessary to apply for a *mandamus* to compel the directors to call in and collect a sufficient amount of the stock to pay these debts. The remedy by bill in equity is easier and more complete. With its power to appoint an auditor or master in chancery to audit the amount of the debts of the corporation in gross and the debt due to each creditor, to ascertain the number of stockholders solvent and insolvent, the per cent. necessary to be paid by each stockholder in proportion to his stock, it is perfectly clear that complete justice can be better administered to every creditor and to each solvent stockholder by a court of equity than by any other form of procedure. It will prevent a multiplicity of suits, save costs, and give speedy and effectual relief. Principle, therefore, and sound reason accord with authority that equity will grant relief in all such cases as this at bar: Ang. on Corp., 602, 603, 611; 8 *Georgia Reports*, 492.

3. We think the process sufficient. It requires the defendants to appear at the court at a certain day and under a certain penalty, to answer the bill and abide the decree, and this we think answers every purpose for which process is framed. We think the service upon the defendants or their acknowledgment of service also sufficient. If there be any irregularity it is all cured by appearance and answer: Code, sections 4177, 3335. Indeed, this would cure even the absence of process: Code, section 3335; 21 *Georgia Reports*,

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384 ; 25 *Georgia Reports*, 646. Besides, if the service were defective because all the defendants have not been served and brought in, the remedy is by invoking an order of the court to have them served, if necessary parties, and not by motion to dismiss the bill.

4. Indeed, at this late stage of the case, after all these agreements of counsel, time allowed to answer or demur, answers filed, reference to auditor and his report in and excepted to, and the demurrer, both to the jurisdiction and for the want of equity, overruled by the court, it would be anything but equity to dismiss this bill. From the very nature of the case, the number of stockholders, their different residences and changes of residence, the death of some, and insolvency of others, it would be very difficult to bring all before the court ; and therefore the statute—Code, section 3367—enacts, that in just such cases suit may be instituted and judgments obtained against such as the creditors may elect to proceed against without making all parties. In every view that we are able to take of the case under the law, we see equity with the complainants and affirm the judgment of the court below overruling the motion to dismiss the bill.

Judgment affirmed.

THE GEORGIA RAILROAD AND BANKING COMPANY, plaintiff in error, *vs.* JOHN C. GOLDWIRE, defendant in error.

1. A railroad employee, injured while on duty in connection with the running of the cars, can, if free from fault himself, recover from the company for the negligence of co-employees in the same service.
2. The verdict in the present case was not contrary to law, if the jury believed the conductor negligent and the plaintiff free from negligence ; and the evidence in support of the verdict is not so weak as to require this court to overrule the judge below in refusing a new trial. He used his legal discretion without abusing it.

Railroads. Master and servant. New trial. Before Judge BARTLETT. Morgan Superior Court. September Term, 1875 -

Reported in the opinion.

BILLUPS & BROBSTON, for plaintiff in error.

A. G. & F. C. FOSTER, for defendant.

BLECKLEY, Judge.

Goldwire, the plaintiff below, was injured while coupling the cars, in the line of his duty, as "train hand" in the employment of the railroad company. The jury rendered a verdict in his favor for \$2,000 00 damages. The company moved for a new trial, the grounds of the motion being that the verdict was contrary to evidence and to the charge of the court. The motion was overruled.

1. The injury, if imputable to the company at all, was caused by the negligence of the conductor or the engineer (one or both) engaged upon the same train of cars, and therefore about the same business with the plaintiff. They were his fellow servants. For this reason it is contended that there could be no recovery. Sections 2083 and 2202 of the Code are relied upon. Under these sections it is insisted that only such employees can recover as cannot possibly control those who should exercise care and diligence in the running of trains. It is said, in argument, that a "train hand" can control the conductor and the engineer by reporting them for neglect of duty. The evidence shows that the conductor is in command of the train, and that both the engineer and the train hand are subject to his control. They take their orders from him while all are on duty together. Indirect control, by informing or reporting to common superiors, is not a very effective resource against the negligence or misconduct of a co-employee invested with this direct control. But the two sections cited do not exhaust the law contained in the Code applicable to the subject. Sections 3033 and 3036 are to be considered also; and they, we think, declare in unmistakable terms, that any employee who is free from fault can recover for the negligence of any other employee, without respect to whether the

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two are engaged about the same business or not. This is the invariable rule that holds between railroad companies and their employees under our Code.

2. If the jury believed from the evidence that the injury was occasioned by the conductor's negligence, especially, and that the plaintiff was, himself, without fault, their verdict was not contrary to law or to the charge of the court. There was certainly evidence tending to establish these facts, and we cannot say that it was insufficient. It was weighed by the jury, and the judge who presided at the trial was content to let the verdict stand. Unless there was some abuse of his discretion, we should not interfere; and it seems to us that no abuse of it appears.

Judgment affirmed.

E. P. WILLIS *et al.*, plaintiffs in error, vs. JOHN MCGOUGH
& COMPANY, defendants in error.

A vendee who has himself warranted to his vendor cannot recover against the latter for a breach, nor can he transmit to another the right so to recover by conveying the land with covenant of warranty.

Warranty. Vendor and purchaser. Before Judge JAMES JOHNSON. Muscogee Superior Court. May Term, 1875.

Reported in the opinion.

INGRAM & CRAWFORD, for plaintiffs in error.

PEABODY & BRANNON, for defendants.

JACKSON, Judge.

This was an action of covenant for breach of warranty of title to land. The facts were that Abercrombie sold to Leonard with warranty, Leonard sold to McGough & Company with warranty, taking bond for titles when he paid them

money loaned, and when the debt was paid, McGough & Company conveyed back to Leonard with warranty, and then Leonard sold to plaintiffs with warranty. While Abercrombie was in possession, judgments were obtained against him, under which the land was sold and the plaintiffs were evicted. The court charged the jury that under this state of facts the plaintiffs were not entitled to recover; thereupon the jury found for defendants, and the error assigned is the charge of the court.

The plaintiffs could recover if Leonard could. Could Leonard recover from the defendants? They held his warranty and he held theirs. If he recovered from them, they could immediately recover back from him; and hence the law, as well as common sense, would not allow Leonard to recover from McGough & Company. But if Leonard could not recover from McGough & Company, his feoffee, Willis & Company, could not, for they hold his warranty and stand in his shoes. He could not transmit to another a right which he did not possess himself. This case is controlled by that of *Fields vs. Willingham et al.*, 49 *Georgia Reports*, 345, which rules that Leonard could not recover under the facts here, and that of *Martin vs. Gordon*, 24 *Georgia Reports*, 533, which rules that no subsequent vendee from Leonard could in such a case recover. We therefore think the charge correct and the verdict right; and as this controls the case, it is unnecessary to consider the other point made in respect to the transaction between Leonard and McGough being only a mortgage.

Judgment affirmed.

BANKS & BROTHER, plaintiffs in error, vs. CHARLES A. BESSER, defendant in error.

The Code (section 2781) declares that upon no bills or notes, except those made for negotiation or intended to be negotiated at a *chartered* bank, shall notice or protest be held necessary to charge the indorser; there-

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fore, a note payable on its face "at the bank of Banks & Brother," which bank is not *chartered* but simply a private banking office, is not subject to notice or protest in order to charge the indorser.

Promissory notes. Indorsement. Protest. Before Judge KNIGHT. Lumpkin Superior Court. September Term, 1875.

Banks & Brother brought complaint against Besser as indorser on a note payable "at bank of Banks & Brother." The defendant pleaded the absence of protest for non-payment and notice to him thereof. On demurrer the court refused to strike this plea, and plaintiffs excepted.

WIER BOYD, for plaintiffs in error.

W. P. PRICE; C. D. PHILLIPS, for defendant.

BLECKLEY, Judge.

Is the indorser bound, without notice and protest, on a note payable at a private banker's office or unchartered bank? The Code, section 2781, answers in the affirmative, and such has been the law of the state ever since the act of 1826 = Cobb's Digest, 594; 4 *Georgia Reports*, 101.

It was argued that because all banks and bankers are taxed by the United States (Revised Statutes, U. S., 673,) and because all who engage in similar business are alike declared banks or bankers by the act of congress, our Code on the subject is no longer of force in its original meaning, and that all banks and bankers are now to be considered as operating under United States laws equivalent to a legal charter by that government. We cannot accept this theory as correct. The United States government has not made every private banker a chartered bank, nor attempted it. It has defined banks and bankers and taxed them, and it has created certain banks by adopting a general banking system. Whether these last are to be held as chartered banks within the substantial intent and meaning of section 2781 of the Code, is not now before us for decision. Most probably they should so be considered,



but there may be difficulties even in going that far: See *Cory vs. The State*, 55 *Georgia Reports*, 236.

Another ruling made at last term, in the case of *Dalton City Company vs. Haddock*, 54 *Georgia Reports*, 584 touching days of grace is to be reconciled with the present one by noticing that the note involved in that case was not payable at a bank or banker's of any kind. The decision itself was, therefore, correct, whether the reasoning on which it was based was so in its full extent or not. It may be that grace is to be allowed on notes payable at private banking offices; but on such notes indorsers are bound without notice or protest, for we cannot possibly affirm that private bankers are *chartered banks*, and unless we could go that far it would be, as we think, in direct conflict with the Code to require either notice or protest, in order to charge indorsers. We reverse the judgment, confining ourselves to the only question which seems to have been directly decided by the court below. Although the question of discharge by indulgence was in the pleadings and was argued here by counsel, it is plain from the bill of exceptions that it was not passed upon either by the court or jury. We prefer to let that branch of the case be tried in the circuit court before acting upon it here.

Judgment reversed.

CAROLINE COTTINGHAM, plaintiff in error, vs. WILLIAM J. WEEKES, defendant in error.

A widow may recover for the homicide of her husband, whether the homicide be the act of a natural or artificial person, or the result of intention or criminal negligence.

Husband and wife. *Torts*. Homicide. Before Judge JAMES JOHNSON. Talbot Superior Court. September Term, 1875.

Reported in the opinion.

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Cottingham vs. Weekes.

W. A. LITTLE, by brief, for plaintiff in error.

JAMES JOHNSON; BLANDFORD & GARRARD; J. M. MATHEWS; E. H. WORRILL, for defendant.

JACKSON, Judge.

Caroline Cottingham, widow of James D. Cottingham, deceased, brought suit against William J. Weekes for the unlawful killing of her husband. The declaration was demurred to on the ground that no right of action existed in case of the homicide of the husband in favor of the wife, except against railroad companies which, by negligence, caused the death of deceased. The single question is, does the right of action exist in all cases. The act of 1850, Cobb's Digest, page 476, gave to the legal representative of the deceased the right to sue for damages in such cases, and that act applies generally to all persons guilty of homicide. The Code gave the right to sue to the widow in lieu of the legal representative of deceased: Code, 2371. By reference to our reports it will be seen that the question was mooted whether the act applied at all to railroad companies. It was held that it did: 24 *Georgia Reports*, 362; but this ruling did not restrict the general right in other cases and against other defendants. It simply applied and extended against corporations as artificial persons, a right of action which the statute gave against persons generally, and which nobody doubted existed by the terms of the act against all natural persons. Nor does the act of 1855-6 take away this right of action against natural persons guilty of homicide. It extends the right to cases against railroads *eo nomine* and restricts the right of recovery to certain persons; to the widow first; if no widow, to the children; if none, then to the legal representative: Acts of 1855-6, page 155. Section 2971 of the Code is as broad as the English language can make its provisions; nor is it restricted by section 2972. That, in terms, applies to *torts* less than homicide, because the plaintiff's ordinary care is al-

handed to; but here the plaintiff is the wife, and the husband, whose care alone could have prevented the homicide, is dead. It may, indeed, qualify too the guilt of railroad companies and others; but it cannot at all affect the general scope of section 2971, which we think, by its plain terms, embraces all perpetrators of murder or manslaughter. While the context may properly be referred to in order to ascertain the meaning of doubtful words or terms, yet where the words are plain and the terms clear, and in their ordinary signification give a right, that right should not be narrowed by a resort to the context; and while statutes should be construed *in pari materia*, especially in the same Code, yet the plain meaning of one paragraph should not be distorted by a resort to another paragraph, particularly where both can be so construed that both may stand in their obvious sense. Section 2971 of our Code gives the right of action in all cases of homicide; section 2972 refers by its terms to *torts* less than homicide when the party plaintiff is the injured person, and by construction and analogy and reason to homicides by railroads, especially where negligence is always an element, and to other cases of homicide where criminal negligence might have caused death, and where the doctrine of contributory negligence may arise. In view of the act of 1850, altered by the Code only in so far as the widow, and if she be dead the children are made the plaintiffs instead of the legal representatives of the murdered man, we feel confident that the court erred in sustaining the demurrer and dismissing the action.

Let the judgment be reversed.

M. A. COHEN, plaintiff in error, vs. JOSEPH PRATER, defendant in error.

The indorsee of a note containing no negotiable words, is chargeable with notice of all defects in the consideration, although he takes it before due and for value. The negotiable paper which is not subject to such a defense, in the hands of a *bona fide* indorsee, is paper which the parties

Cohen & Prater.

render negotiable as a part of their express contract, and not such as, wanting negotiable words, the statute alone renders negotiable for the purpose of passing the legal title and enabling the indorsee or assignee to sue in his own name.

Promissory notes. Indorsement. Notice. Before Judge RICE. Hall Superior Court. September Term, 1875.

Reported in the opinion.

ESTES & BOYD; W. U. GARRARD, for plaintiff in error.

J. F. LANGSTON, for defendant.

BLECKLEY, Judge.

Is a note containing no negotiable words, transferred by indorsement before due, the indorsee paying value and having no actual notice of any defect in the consideration, subject, in his hands, to the defense of failure of consideration? This was the only question argued, counsel waiving all others presented by the record.

It is conceded that prior to the Code, negotiable words in the paper itself were necessary, even to enable the indorsee to sue in his own name: 1 *Kelly*, 77, 237. The Code, it is contended, altered this rule of law, not only so far as to make the indorsement or assignment pass title, but pass it free from all defenses that could not be set up against negotiable paper proper. All the sections of the Code supposed to bear in any wise on the subject will now be examined. Section 2214 declares: "All choses in action arising upon contract may be assigned so as to vest the title in the assignee, but he takes it, except negotiable securities, subject to the equities existing between the assignor and debtor at the time of the assignment, and until notice of the assignment is given to the person liable." This plainly alters the prior law as to passing title: See 44 *Georgia Reports*, 636; but not necessarily any further, because the words, "negotiable securities," as here used, may be used in the restricted sense in which they were employed prior to the Code. The presumption is that way: 34 *Geor-*

Reports, 249 ; 47 *Ibid.*, 679; 42 *Ibid.*, 596. Section 2639 declares: "The *bona fide* purchaser of a negotiable paper not honored, will be protected in his title, though the seller has not." There is no change here. This was the law before, see 2 *Kelly*, 92; 22 *Georgia Reports*, 246; 25 *Ibid.*, 546,) and the spirit and reason of the section will harmonize rather better with the old meaning of "negotiable paper" than with the new meaning supposed to be introduced by the Code. Section 2773, which is under the head of "negotiable instruments, and how transferred," defines a bill of exchange; and the next section, which is under the same head, defines a promissory note.

Both these definitions, it will be seen, as if the codifiers kept in mind the heading of the article, apply to negotiable bills and notes proper; that is, bills and notes with operative negotiable words in the instruments themselves. Here are the definitions: "A bill of exchange is an order by one person, called the drawer or maker, to another, called the drawee or acceptor, to pay money to another, (who may be the drawer himself,) called the payee, or his order, or to the bearer." "A promissory note is a written promise made by one or more persons to another, or order, or bearer, at a specified time, a specified amount of money, or other articles of value." The next section, 2775, is in these words: "A promissory note is negotiable by indorsement of the payee or holder; or, if payable to bearer, by transfer and delivery only. The maker may retain the negotiability thereof by expressing such intention in the body of the instrument." Both these provisions have been law ever since 1799, as will be seen by referring to 1 *Kelly*, 237, cited above, if we construe a negotiable promissory note to be such a note as has just been defined in the preceding section, that is, one payable "to another, or order, or bearer." It is no late thing for such notes to be transferable in the precise manner here laid down; and the act of 1799 allowed the very same restraint on negotiability, by express declaration of intention, which is allowed here and in section 2777.

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Model of negotiable paper is thus given us in negotiable bills and notes; and the manner of negotiating notes is prescribed. In all this we discover no departure from the old law. There is certainly no express change in the old law that *bills of exchange* are negotiable, or how they are to be negotiated. The section which defines a bill (sec. 2773,) completing the definition, adds: "If the payee or a holder transfer the bill by indorsement, he then becomes the indorser." This is all which the Code anywhere says about negotiating bills of exchange, except in grouping them with promissory notes, in section 2776, which section is an important one in this discussion, and reads as follows: "All bonds, specialties, or other contracts in writing for the payment of money, or any article of property, and all judgments and executions from any court in this state, are negotiable by indorsement or written assignment, in the same manner as bills of exchange and promissory notes. No indorsement or assignment need be under seal." The words, "in the same manner as bills of exchange and promissory notes," are suggestive of a standard of negotiability dependent on negotiable words in the instrument. The note pronounced negotiable is of that character, consequently the bond, the specialty, or other contract in writing, ought to be so too. This view harmonizes with the construction placed in 1 *Kelly*, 237, on the kind of words used in the act of 1799. It is, however, embarrassing by the presence in this section of judgments and executions which are always without negotiable words; but, while we feel the embarrassment, we think it a much lighter one than would be encountered by holding that a section adhering closely to the act of 1799 was intended to carry a meaning opposite to what had early been declared by this court as the true construction of that act. If the Code had meant to destroy all distinction between paper payable to A or order and paper payable to A simply, why did it not do so in other terms? As to judgments and executions, though they are called negotiable in this section, it certainly cannot in any sense which raises them to any dignity higher than

which they before employed. They are still subject to all prior equities: Code, section 3597. Sections 2785 to 2789, inclusive, touching the rights of holders, will, on comparison with the old law, be found to be free from novelty. The entire article may be read without any new sense of the phrase, "negotiable instruments," being called for or thought of.

Only one more section seems sufficiently pertinent to demand consideration, and that is section 3471, which limits pleas of total or of partial failure of consideration to cases "between the original parties to the contract, or their privies or assignees, whose title has been acquired with notice, actual or constructive, or by operation of law." This section is in accord with section 2244 and with the long recognized law, if all purchasers of paper not in terms negotiable, are held to buy at their peril, and to be chargeable constructively with notice of any and all defects and equities that originate prior to their purchase. The want of negotiable words on the face of the paper, should put purchasers on inquiry, and if they fail to discover defenses that exist, it is their own misfortune.

Our conclusion is, that title may pass under the Code which could not pass before, and in that loose sense, there may be now a class of negotiable paper which before was not called negotiable in any sense; that, however, the strict and proper sense of negotiable paper, is paper containing within itself operative words of transfer, the same character of paper called negotiable before the adoption of the Code; and that the law of defense, in respect to failure of consideration, etc., is, in substance, the same now as it was aforesaid. There is some indication of an opposite view in the reasoning of Judge McCAY, in 50 *Georgia Reports*, 109; but as the note in that case contained negotiable words, that part of his reasoning was not necessary to the judgment of the court. Such a note would carry with it a mortgage given to secure it, as is shown by the authorities which he cites.

Judgment affirmed.

McElven *et al.* vs. Sloan & Company.

GEORGE E. McELVEN *et al.*, plaintiffs in error, vs. A. M.
SLOAN & COMPANY, defendants in error.

The fact that a deceased father, who was discharged in bankruptcy from the payment of his debts, and who died insolvent, owed a promissory note in 1856, without more, does not impose upon the sons such a strong moral obligation to pay that old note, so discharged in bankruptcy, as to become a good consideration to support a new note given by the sons for the principal of the old note.

Promissory notes. Consideration. Parent and child. Before Judge WRIGHT. Mitchell Superior Court. May Term, 1875.

Reported in the opinion.

B. B. BOWER; D. A. RUSSELL; O. G. GURLEY, for
plaintiffs in error.

FLEMING & RUTHERFORD, by JACKSON & LUMPKIN, for
defendants.

JACKSON, Judge.

and the two McElvens on

It will be seen that the whole question is whether the facts make out a good consideration in law to support the note, or whether it is *nudum pactum* and void. In other words, are the sons morally bound to pay the debts of a bankrupt, deceased, and insolvent father, who left no estate to come into their hands? It would certainly be quite honorable for sons to do so; it would evince a high tone of veneration for their father, a very nice and delicate sense of honor in themselves, but we hardly think that a strong moral obligation rests upon them to do so. The Code declares that "a good consideration is such as is founded on natural duty and affection, or on a strong moral obligation:" Code, section 2741. If this note had been given for medical services rendered the deceased parent, or for his support or clothing, or for some similar benefaction rendered to him, either or any such consideration we think would amount to natural duty and affection, and would also lay a strong moral obligation upon the sons to reimburse the benefactor of the parent, and would support such a promise to pay. If these sons had received a share of their father's estate at the time the original note was given, and had thus obtained some of his property on which the credit had been given the father, we are disposed to think that such fact might lay a strong moral obligation upon them to do something to pay the old note or a part thereof, and would thus support a new promise to pay. But the naked question here is this—are the sons of a father who has been discharged in bankruptcy and left no estate at all at his death, and who, so far as the record discloses, never gave these sons any of the property, on the strength of which credit was given the father, are they under so strong a moral obligation to pay the father's debts from which he was discharged in bankruptcy, as to support a promise to pay those debts without the slightest benefit passing to themselves? We have been cited to no authority to sustain the affirmative of this proposition, and we have found none ourselves, and therefore we shall rule that the court below erred in striking defendant's plea. How it may be on another trial, what additional facts may be shown

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in the way of moral obligation to support this promise we do not know; but if the facts set up in the plea be true, and if the plaintiffs cannot show something else to strengthen the case, we think the facts make such a case as will prevent recovery for the plaintiffs and protect the defendants in resisting the payment of the note.

Let the judgment be reversed.

MARTIN L. SHEALY, plaintiff in error, vs. WILLIAM L TOOLE, defendant in error.

1. A plea is demurrable which alleges the pendency of a garnishment, without saying in whose favor or for what amount. Such a plea is defective not only in form but in substance, and though amendable, if not amended it should be stricken on general demurrer.
2. When there is no plea before the court to which the evidence offered applies, the evidence should be rejected.
3. The pendency of a garnishment is not a good plea in bar to a suit against the garnishee by his own creditor; but it affords equitable ground for moulding the judgment so as to stay execution for so much of the debt as ought to be held up until the garnishee is set free from the garnishment proceeding. Interest and costs are also matters for equitable adjudication, when proper issues as to the same are made by the pleadings.
4. When a contract is usurious on its face no plea of usury is necessary.
5. At the date of the note sued upon, the legal rate of interest was seven per cent. per annum, and a contract for more than ten per cent. was void as to the excess; therefore the undertaking in the note itself to pay interest at two per cent. per month was usurious, and a verdict for interest at that rate was contrary to law.
6. A contract signed on a note by the maker in these terms: "In consequence of the attached note * * not being paid at maturity, I hereby promise and agree to pay two per cent. interest per month until said note is paid," is *nudum pactum*. The past default of the debtor, or past forbearance of the creditor, could not be a consideration for a contract to increase the lawful rate of interest which the note bore when executed, although, in the meantime, all restrictions upon conventional interest had been removed by statute. The agreement recited does not stipulate for future indulgence or forbearance, or import an undertaking by the creditor to grant any.
7. When a contract, on its face, is without consideration and there is no consideration established by the evidence, the contract cannot be enforced, although want of consideration be not pleaded.

ATLANTA, JANUARY TERM, 1876.

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8. The defendant must know at his peril what is set out in the copy not annexed to the declaration. He cannot claim after trial to have newly covered a stipulation overlooked, and urge his ignorance of it as cause for a new trial: *34 Georgia Reports, 110.*

Pleadings. Evidence. Garnishment. Usury. Contract. Consideration. New trial. Before Judge CLARK. Summons. Superior Court. October Adjourned Term, 1874.

Report unnecessary.

JOHN R. WORRILL, for plaintiff in error.

FORT & McCLESKY, for defendant.

BLECKLEY, Judge.

This was complaint in the short statutory form, on two notes dated in December 1872, and due on February 1st, 1873. A copy of each note was annexed to the declaration, including the words "due interest at two per cent. per month." Upon each note was an undertaking signed by the maker, under date of March 26th, 1873, substantially in the terms set out in the 6th head-note to this opinion. A copy of each of these undertakings was, with the copy notes, annexed to the declaration.

There was a plea of the general issue, and one of partial payment, but none of usury or of want of consideration. The defendant filed a special plea that he was garnished, and that the garnishment was still pending; but failed to allege who the plaintiff in garnishment was or what amount he claimed. His plea was demurred to generally, and was stricken by the court.

At the trial, the defendant offered in evidence the record of the garnishment proceeding, and it was rejected. The judge charged the jury that if there was evidence of a contract to pay interest at two per cent. per month, they might find interest at that rate; and the jury so found. There was no evidence of consideration for the agreements dated in March, 1872, than that expressed therein.

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For verdict, the defendant moved for a new trial on various grounds; among them, one called newly discovered evidence, in support of which he filed an affidavit to the effect he did not authorize the insertion in the notes of the words "due interest at two per cent. per month," and did not know they were in the notes until after trial and verdict. The court refused a new trial, overruling all the grounds.

With this statement of facts, and the head-notes, the views of the court on the law of the case can be understood. In reference to the plea of garnishment as a defense, the prior decisions of this court should be cited: They are 5 *Georgia Reports*, 425; 6 *Ibid.*, 550; 8 *Ibid.*, 549; 20 *Ibid.*, 477; and *Hamilton vs. Morris*, decided at the present term.

While we rule that such a plea is no bar to the creditor's suit, we think, when the pendency of a garnishment is fully and correctly pleaded, it furnishes occasion, a most fit occasion, for moulding the judgment under sections 3562 and 3082 of the Code, so as to stay execution for a proper amount of the debt so long as is necessary for the garnishee's protection. We also think that the matters of interest and cost might be dealt with, on such a plea, upon equitable principles, so as to do no injustice to either party.

We are satisfied with the verdict except on the allowance of interest. There could be no valid contract at a rate above ten per cent. until the act of 19th February, 1873, was passed; and even after that, some consideration was necessary. No substantial consideration appears for the new agreements in the present case. But the head-notes are full enough on all the points we have considered.

We reverse the judgment of the court below refusing a new trial, unless the plaintiff shall, at the next term of the superior court, write off all interest recovered, except interest at regular lawful rate of seven per cent. per annum, from after the maturity of the notes; in which event the judgment so modified, will stand affirmed.

DUNCAN McLOUGHLIN, plaintiff in error, *vs.* **MARGARET A. KING**, defendant in error.

When the affidavit of foreclosure of the lien of the owner of a saw mill, was lost, and the court refused to continue the case on the ground of its loss, but gave ample time for the establishment of a copy, and put the plaintiff on terms to establish the copy by a day certain, and the plaintiff did not establish the copy, nor ask for more time, nor show when he could establish it, the issue to be tried being the sufficiency of such affidavit:

Held, that this court will not control the court below by reversing its judgment of dismissal of plaintiff's case.

Practice in the Superior Court. Before Judge WRIGHT.
Decatur Superior Court. May Term, 1875.

Reported in the opinion.

BOWER & CRAWFORD, for plaintiff in error.

FLEMING & RUTHERFORD, by **JACKSON & LUMPKIN**, for defendant.

JACKSON, Judge.

The plaintiff foreclosed his lien as saw-mill owner against defendant for lumber furnished. The *fi. fa.* was levied, and the defendant made an affidavit of illegality on various grounds, among them upon the ground that the affidavit of foreclosure did not set out the facts necessary in law to constitute a lien. When the case was called, the defendant moved to continue on the ground that the affidavit of foreclosure was lost; the court refused to continue for the term, but set the case down for trial on Wednesday of the next week, and required the plaintiff to have a copy of his affidavit established by that time on the penalty of having the case dismissed. On the day appointed the copy affidavit was not established, and the case was dismissed. The only reason assigned for its non-establishment was that the attorneys could not remember its terms; no further time was asked, nor did the counsel state when the copy could be established; on the contrary, if they could not remember the terms of the

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affidavit then, it seemed doubtful if they ever could. The older the transaction became, the less likelihood of remembering it would there be. The affidavit was essential to a proper understanding and adjudication of the case; the issue made by defendant was its insufficiency; a copy ought to have been made; time enough was allowed the counsel to make it; no further time was asked; no prospect held out that it would be established in the future; and we therefore think the court could do nothing else than to dismiss the case.

Judgment affirmed.

D. R. ADAMS & SON, plaintiffs in error, *vs.* Z. B. REID *et al.* —
executors, defendants in error.

Where an executor takes the note of one member of a firm which was debted to his testator on a deposit account, with a note on a third person collateral security, in payment of such indebtedness, if, at the time, for benefit of the estate and done in good faith, the original indebtedness discharged.

Administrators and executors. Payment. Partners
Before Judge BARTLETT. Putnam Superior Court. September Term, 1875.

Reported in the decision.

W. F. JENKINS, for plaintiffs in error.

THOMAS G. LAWSON, for defendants.

WARNER, Chief Justice.

This was an action brought by the plaintiffs as the executors of Alexander Reid, deceased, against the defendants, as partners, to recover the balance of a sum of money alleged to be due by defendants, as bankers, on deposits made with them by their testator in his lifetime. To this action the defendants pleaded that the debt had been paid and satisfied, by one of

the partners, D. R. Adams, giving his note therefor to Z. B. Reid, one of the executors, after the testator's death, and that there had been a novation of the original contract. On the trial of the case the jury, under the charge of the court, found a verdict for the plaintiffs for the sum of \$575 82 with interest. The defendants made a motion for a new trial on the several grounds therein set forth, which was overruled by the court, and the defendants excepted.

It appears from the evidence in the record, that on the 13th of November, 1872, D. R. Adams made and delivered his due-bill to Z. B. Reid, executor, for the sum of \$575 82, and also delivered to him a note on Carswell, payable to him, Adams, as collateral security, who, at the time of the trial, was shown to be insolvent, but was solvent at the time the note was taken by the executor. The evidence in the record, as to whether the due-bill was taken in full payment of the debt, was conflicting. The defendants requested the court to charge the jury, in substance, that if the due-bill was made and delivered by D. R. Adams to Z. B. Reid, executor, as payment and settlement of the debt sued for, under an agreement to that effect, that then they should find for the defendants, and also requested the court to charge that if the due-bill was given for the balance of the debt sued for, originally due by D. R. Adams & Son, under an agreement with the executor to receive the same in lieu of the debt sued for, leaving out the other partner, then it was a novation of the original contract, and they should find for the defendants, which requests were refused, but to the contrary thereof, the court charged the jury "that if they believed, from the evidence, that the claim sued on was a debt due by D. R. Adams & Son to Alexander Reid, at the time of his death, then the court charges you that the executors of Alexander Reid could not legally accept the note of D. R. Adams in payment of said claim, without first obtaining an order from the ordinary having jurisdiction of said estate, authorizing them to do so." This charge of the court, in view of the evidence contained in the record, was error. The evidence does not show that there was

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any attempt to compromise the debt due by the defendants to the plaintiffs' testator, as contemplated by the 2537, 2538 and 2539 sections of the Code. The alleged agreement recognized the full amount of the debt claimed to be due; there was no proposition made or accepted, to reduce it in any way for the purpose of effecting a settlement thereof. The question in the case was whether the executor, with a full knowledge of the fact that the defendants were partners, agreed to take D. R. Adams' note, with Carswell's note as collateral security, in payment of the debt, and whether that arrangement at the time it was made, was for the benefit of the estate? If the taking of D. R. Adams' note, with Carswell's note as collateral security, by the executor in payment of the debt, was in good faith, and was for the benefit of the estate at that time, then the executor would be protected, and the payment be good, otherwise, it would not be: Toller's Law of Executors, 374. The charge of the court excluded from the consideration of the jury this view of the case, and for that reason, we reverse the judgment overruling the motion for a new trial.

Judgment reversed.

JAMES M. BENNETT, plaintiff in error, vs. GEORGE A. BROWN,
defendant in error.

1. A bill of review will be sustained where the whole scope and object of the original bill was to charge certain defendants against whom no decree passed, and where it would be a great strain of language to construe the original bill as contemplating or warranting any such relief as was granted, separately, against another defendant, the only one decreed against, and the one who now brings the bill of review.
2. While mere irregularities afford no ground for a bill of review, glaring defects, such as omitting a proper interlocutory judgment taking the bill *pro confesso*, and such as not signing up the final decree by the chancellor, but by the complainant's solicitor, will be regarded, in aid, at least, of a substantial ground like that mentioned above.
3. When a bill of review is brought, and there appears to be good cause for

reversing the decree, the enforcement of the decree by levy and sale will be enjoined until the hearing on review.

Equity. Bill of review. Before Judge CLARK. Sumter County. At Chambers. February 25th, 1876.

Bennett filed his bill against Brown, praying that a decree rendered in favor of the latter against him, on a bill filed in Sumter superior court against Furlow, Price & Furlow, to which he had subsequently been made a party, should be vacated, and that the sale of certain property levied on under the execution issued on such decree should, in the meantime, be enjoined. The grounds alleged for the vacation of such decree were, in brief, as follows:

1st. Because there were neither allegations in such bill charging complainant with any liability to defendant, nor any prayer for relief as against him.

2d. Because there was neither process attached to said bill nor appearance on the part of any of the defendants:

3d. Because such decree was signed by counsel and not by the court.

4th. Because the verdict upon which the decree purports to have been entered, was rendered on October 15th, 1872, whilst said decree was dated March 8th, 1873, more than four days after the adjournment of the court.

Complainant further alleged facts showing that he was not indebted to defendant at the time of the filing of the aforesaid bill or when such decree was rendered.

The original bill, the proceedings upon which are sought to be reviewed, presented, in substance, the following facts:

Complainant, George A. Brown, shows that on October 1st, 1855, one James M. Bennett, of said county, (Sumter,) owned a negro girl, which he mortgaged to complainant to secure an indebtedness of \$500 00. The negro was subsequently turned over to John V. Price, a member of the firm of Furlow, Price & Furlow, who took the same with full notice of the aforesaid mortgage. Bennett was indebted to the aforesaid firm, and before the delivery of the negro to Price, the latter had

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sulted with complainant as to the mortgage aforesaid, and to the best means of securing the payment of both debts, when it was suggested by complainant that Price had best take possession of such slave to prevent her being run off. Price then represented that he thought an arrangement could be made by which Bennett would turn over all his assets to him or to his firm, in which case such firm would take an assignment of the aforesaid mortgage and give their acceptance for the amount of complainant's claim. Furlow, Price & Furlow did take a bill of sale to a stock of goods owned by Bennett to secure the amount due them, but subsequently, without the consent of complainant, gave up such stock to secure other creditors. They then claimed the aforesaid negro under a bill of sale or mortgage, which they said they had obtained from Bennett prior to the execution of the mortgage to complainant. Possession of said negro was yielded to Price with the understanding that he would secure both the aforesaid claims with that and other property which was to obtain from Bennett. Complainant foreclosed the mortgage, and on January 5th, 1856, execution issued, but the negro was not to be found. Price informed the sheriff that he had been suspecting something of the kind, and that the negro was out of the state. He has placed such slave beyond the reach of the execution. Furlow, Price & Furlow pretend that the negro belongs to them under the aforesaid bill of sale, but complainant charges that if there be any such instrument it is void as a secret lien, and that, if a mortgage, it has lost its priority from failure to record the same. Complainant prays discovery and the writ of *subpœna* to be directed to Furlow, Price & Furlow.

The bill was filed on February 9th, 1856, and on the same day service was acknowledged, and "copy process" waived by each of the members of Furlow, Price & Furlow. No process of any kind was attached.

On September 9th, 1856, it was ordered by the court that complainant have leave to amend by making Bennett a party defendant.

The entries on the docket were as follows :

"September adjourned term, 1856. Order to perfect service."

"September adjourned term, 1857. Order to plead, answer and demur."

"Verdict taken on bill *pro confesso*. October term, 1860. Appealed by consent."

"Continued. April term, 1867. October adjourned term, 1868. Continued."

"Bill dismissed as to Furlow, Price & Furlow, and decrees to Bennett. October term, 1872."

On October 15th, 1872, a verdict was rendered in favor of Furlow, Price & Furlow, and against Bennett for \$500 00, with interest, "he being in default."

A decree in the form of a common law judgment, signed by complainant's solicitors, was entered on March 8th, 1873.

To the execution issued on this decree, Bennett filed an affidavit of illegality, which was decided adversely to him. He then moved to set aside the decree and it was ruled to the contrary by the court. He now files his bill for review and injunction.

The injunction was refused, and he excepted.

GUERRY & SON, for plaintiff in error.

W. A. HAWKINS; N. A. SMITH, for defendant.

BLECKLEY, Judge.

The object of this bill is to vacate a decree made on a former bill, and, in the meantime, to enjoin the enforcement of that decree by the sale of property now under levy. The chancellor refused the injunction prayed for, and that is the error complained of.

The former bill was by Brown against Furlow, Price & Furlow. Bennett, the complainant in the present bill, was made a party defendant to that bill by amendment. He never appeared or made any defense. The case lingered in

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court for a long time. It was commenced in 1856, and in 1873 the jury rendered a verdict in favor of Furlow, Price & Furlow. The same verdict found against Bennett \$500 00, with interest and cost. On that verdict no decree was signed by the chancellor, but the complainant's solicitors entered up a decree in the usual form of a judgment at common law, signing it themselves, in favor of their client, Brown, against the defendant, Bennett. On that decree execution was issued, and the same being levied on Bennett's property, he filed an affidavit of illegality. That was decided against him. He then moved to set aside the decree, and that was decided against him: See *Brown vs. Bennett*, 55 *Georgia Reports*, 189. He is now here with a bill of review, and the question is whether he has found his right remedy at last, or whether he is without remedy.

1. The whole scope and purpose of the original bill was to charge Furlow, Price & Furlow. They had received and run off a negro girl belonging to Bennett, on which Brown had a mortgage for \$500 00, Bennett being his debtor for that sum. The mortgage had been foreclosed, but too late to be levied, the negro not being accessible. That was Brown's grievance. He did not complain that Bennett had done anything that was wrong or contrary to good faith. On the contrary, he alleged in his bill that he (Brown) himself had suggested to Price to take the negro, and that Price acquiesced in the suggestion; and that when Price received the negro he did so with the understanding that it was to secure Brown's claim as well as the claim of Furlow, Price & Furlow. It turned out that Price did not carry out this arrangement, but claimed title to the negro for his firm, and put her out of the reach of Brown's mortgage. Bennett was insolvent, and Brown's bill alleged that his only remedy was in equity. Surely his case required no decree in equity against Bennett. It was not a suit on the debt, with a view to putting that into judgment against Bennett. The amount of the debt is stated in the bill, but there is no further description of it, except by the date of the mortgage. The bill does not

say how or for what the debt was contracted, whether it was by note or account, or when it became due. The bill, then, as against Bennett, cannot be considered as a suit to recover the debt. Neither can it be regarded as based on the mortgage. The mortgage was foreclosed already, and Brown needed no further judgment on the mortgage as against his debtor, Bennett. What was there left to serve as the basis of a separate decree against him? Nothing. He was charged with no *tort*. The bill was not a suit on the debt or on the mortgage any further than these were involved in grounding an equity against Furlow, Price & Furlow. Then, was it not a great strain to construe the bill as calling for or warranting any separate relief against Bennett? There was no such relief specifically prayed for, and to grant it under the prayer for general relief would be to deviate widely from the obvious scope and purpose of the bill: 2 *Kelly*, 413. With the charges of the bill as premises, we think no logic of law or equity would ever lead to a separate money decree against Bennett as conclusion. Such a decree is an absolute *non sequitur*. It is a remote after-thought, or a mere dream. If the bill were a declaration in a court of law, judgment on it would be arrested. Take all its allegations for true, and there ought to be no recovery in any court against Bennett. If the bill alleges the truth, Bennett was not to blame for turning the negro over to Price; and the possession of the negro by Price or his firm, and the disappearance consequent thereon, gave occasion for the bill.

2. We are the more ready to break down the so-called decree, because there are not only irregularities, but most glaring defects, in the record of that suit. There was an order to take the bill *pro confesso*, as to Bennett, unless he answered at the next term, but no order passed actually so taking it, or any part of it. We hardly think the Code, section 4212, was intended to change the prior practice; and that made the order essential: 13 *Georgia Reports*, 24. Again, the Code, section 4212, says "a decree in chancery is the judgment of the chancellor upon the facts ascertained and should be signed

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by him." Here the chancellor seems to have had nothing to do with the decree, but the complainant's solicitors give it to us, over their signatures, as what the court has considered and adjudged. It was attempted, in argument, to justify this practice by calling attention to section 4215, which says that a decree for money shall be enforced by execution against property as at law; but this relates to enforcing the decree, not to making or authenticating it. All decrees, without exception, should now be signed by the chancellor. Prior to the Code that was not necessary, (42 *Georgia Reports*, 208,) but we are not sure that a proper construction of the Code would allow the chancellor's signature to be dispensed with. We do not absolutely rule the question, for we are not obliged to do it, there being enough error otherwise to overturn the decree we are considering.

3. The injunction should be granted as prayed for until the final hearing on review. No question was made before us as to additional parties. It may be that Furlow, Price & Furlow are not without interest in this bill of review; and if so, they should be brought in by amendment: 6 *Georgia Reports*, 207; 7 *Ibid.*, 110.

Judgment reversed.

RADCLIFFE & LAMB, plaintiffs in error, vs. **VARNER & ELLINGTON**, defendants in error.

Whilst defendants having an equitable defense and being empowered by the Code to make it at law, will be concluded by the neglect to set it up as a general rule, yet where new parties must be made before complete equity can be done, and courts of equity are authorized by statute to make such parties whilst courts of law are not, equity will administer relief and that end will grant an injunction to stay the common law proceedings before or after judgment, on a proper case made.

Injunction. Judgments. Equity. Before Judge CRAWFORD. Muscogee County. At Chambers. March 2d, 1876.

Reported in the opinion.

BLANDFORD & GARRARD, by R. F. LYON, for plaintiffs in error.

PEABODY & BRANNON, for defendants.

JACKSON, Judge.

This case was before this court at the last term. Varner & Ellington had sued Radcliffe & Lamb on the acceptance of a draft drawn on them by May. To this suit Radcliffe & Lamb filed an equitable plea to the effect that they had entered into partnership with May to run two plantations in Macon county, Alabama, in which articles of partnership it was stipulated that May should buy all supplies through them; that Varner & Ellington had knowledge of the contract, and yet credited May, and May sent them cotton, which instead of being applied to the payment of this draft, which was given for previous supplies, was applied to other debts contracted by May for supplies and cash, against the stipulations of the contract, and they asked that the proceeds of this cotton, somewhere about the amount of the draft, be applied as an equitable set-off to the debt due on the draft. The court decided then that inasmuch as the cotton belonged to May as well as to Radcliffe & Lamb, and May was not a party to the common law-suit, but the action was against Radcliffe & Lamb only, the set-off could not be allowed, and sustained the judgment below to that effect. But we also held that upon a proper bill made, making May a party, so that all equities between him and Radcliffe & Lamb might be adjusted, relief might be afforded to the latter against Varner & Ellington.

This bill is now filed, May is made a party, and it is alleged in the bill that he is largely indebted to Radcliffe & Lamb on account of the partnership, and would be entitled to no part of the cotton or its proceeds, in the hands of Varner & Ellington, and relief is asked; and to the end that a jury may

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pass upon the facts, an injunction is asked to stay the common law judgment until the parties can be heard in equity. If the chancellor, in the exercise of his discretion, had put his decision declining to grant the injunction upon the disputed facts in respect to the knowlege or want of knowlege of the defendants in error of the terms of the contract of partnership, we should not have interposed to control his discretion. But inasmuch as we understand that his judgment rests upon what we conceive to be a misconstruction of previous rulings of this court on the question of how far a defendant to a common law suit will be bound to put in his equitable defenses, if he has any, or be precluded from setting them up in equity on a bill after judgment, we have concluded to set down what we believe to be the true rule, and to act upon it in this case. We ruled, when the case was here before, at common law, that if Varner & Ellington had notice of this contract they could not have sold to May, in the teeth of a stipulation in it that May should buy supplies only through Radcliffe & Lamb, and that the same rule applied to the purchase of the cotton, if they knew that it was by the partnership contract to be sent to Columbus; and we withheld relief, only because of May not being a party. Now could May have been made a party at common law? We know of no process by which he could. Provision is made in equity for such cases, but none that we are aware of at law: Code, sections 4181, 3480. Whilst, therefore, we hold that a party who has an equitable defense, which can be set up at law, must do so or he will be concluded by the judgment, our Code having given him the clear right to do so: Code, sections 3081, 3082; *Field vs. Price*, 52 *Georgia Reports*, 469; *Grubb, administratrix, vs. Hall et al.*, decided at the present term, and not yet reported; yet, where good reasons exists why he could not set up such equitable defense, a court of equity will still interpose and give him the aid necessary to enable him to do so: *Southwestern Railroad Company vs. Chapman*, 47 *Georgia Reports*, 562; and the case of *Grubb, adm'x, vs. Hall et al.*, *supra*.

Surely no better reason can exist than that, from want of

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parties and want of power in the common law court to make them, he could not set up the equitable defense. And that is this case. The plaintiffs reside out of the state, they come in it to sue, they are charged with inequitable conduct, they hold funds which, if what complainants assert be true, should be set off against this draft, and while the facts are disputed, we think the weight inclines to the side of the plaintiffs in error. At all events, under the decision of this court, in this case before, in which this remedy is almost suggested, (see opinion of Mr. Justice BLECKLEY, not yet published,) it would be unjust not to allow the plaintiffs in error an opportunity of being heard before a jury on the case made by their bill. It is due to the judge below to add, that had that opinion been published and met his eye, he would doubtless have granted this injunction under its intimations.

Judgment reversed.

THE CENTRAL BANK OF GEORGIA *et al.*, plaintiffs in error,
vs. JOHNSON & SMITH *et al.*, defendants in error.

1. The assets of an insolvent firm were in the hands of a receiver. The creditors agreed among themselves upon a rule of distribution to be carried out by a committee. This committee refused to allow the claims of certain creditors. The excluded parties were about to file a bill to enjoin their further proceeding with such distribution, when it was agreed that the committee should report their action to the court, as if a bill had been filed, for direction. This was done, and the report as to the rejected claims set aside. To this ruling exception was taken.

Held, that the court had no authority to act upon the matter in controversy upon the pleadings before it.

2. The 21st rule of court to the effect that pleadings cannot be dispensed with by consent, is applicable, in reason and spirit, to courts of equity.

Equity. Pleadings. Jurisdiction. Rules of Court. Before Judge HILL. Bibb Superior Court. October Term, 1875.

Reported in the decision.

The Central Bank of Georgia *et al.* vs. Johnson & Smith *et al.*

LANIER & ANDERSON, HILL & HARRIS, for plaintiffs in error.

WHITTLE & GUSTIN; R. W. JEMISON; POE, HALL & LOFTON, for defendants.

WARNER, Chief Justice.

This case comes before us on a bill of exceptions to the decision of the court below in setting aside the report of a committee of the creditors of Burr & Flanders, under the facts and circumstances as set forth in the record. It appears from the record of the case that the creditors of Burr & Flanders, for the purposes therein expressed, entered into the following agreement and submission, to wit:

"ANNA L. FORT and JOHN B. WILEY, by next friend, *et al.*,
vs. BURR & FLANDERS *et al.*

"Bill, etc. In Bibb Superior Court.

"GEORGIA, BIBB COUNTY.—The undersigned, creditors of Burr & Flanders, for the purpose of stopping the litigation growing out of the failure, and of distributing the fund and releasing them, do make the following agreement:

"1st. The individual property of C. M. Wiley shall be applied exclusively to his individual debts, not counting as such any of his indorsements or acceptances of Burr & Flanders' paper.

"2d. The cases in bankruptcy are to be withdrawn, and the costs of the cases in bankruptcy, as well as those in the state courts, shall be paid out of the fund in hand, each party to pay his or their own lawyers' fees.

"3d. The fund in hand, after payment of expenses, shall be divided between the creditors of Burr & Flanders in the following proportion, to-wit: the general creditors of Burr & Flanders shall draw *two-tenths* and the secured creditors shall draw *three-tenths*, and the same shall not extend to any funds to be hereafter realized. The secured creditors, or those re-

ed as such, are the Central Railroad and Banking Com-
about \$....., the Capital Bank about \$....., and the
Bank and Trust Company about \$....., the precise
nts to be ascertained by the committee.

b. All claims against Burr & Flanders shall be pre-
l to the committee appointed by the meeting, which com-
e shall proceed to ascertain the precise amounts of the
, with interest to be calculated upon all of them up to
st day of January, 1875. Any persons having demands
st Burr & Flanders, against which they have sets-off,
alance due thereon shall alone be counted as a debt, and
s holding collaterals in possession shall give credits for
nounts which may have been collected, and also for the
of those remaining on hand, or they shall return the
erals to be thrown into the general fund, and then take
share as unsecured creditors to this extent.

th. Charles M. Wiley to be released and discharged from
s indorsements or acceptances of Burr & Flanders, and
& Flanders are to be discharged from all their liabili-
o these creditors; but none of the partners shall claim
omestead or exemption of personalty out of the funds
rr & Flanders.

th. The fund belonging to Burr & Flanders shall be dis-
ted as early as practicable in the proportions above speci-
and for this purpose the fund shall be withdrawn from
ity Bank and placed in the hands of the committee ap-
ed, as aforesaid for distribution either by an order of the
or by the check of the receiver, to whose credit it is
deposited.

th. Henry L. Jewett, John E. Jones and Richard W.
edge, are hereby appointed a committee of the creditors
powers as herein specified. In cases of disagreement
g the committee as to the amounts of claims or their
ities, such cases shall be referred to Judge J. J. Gresham,
e decision shall be final. This committee shall take
ge of and sell the mill property to the best advantage
collect the remaining assets, and from time to time make

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a distribution of the same under the rule and proportions aforesaid. And the committee shall have full power to compromise all claims due to Burr & Flanders, so as to bring the whole matter to a close as early as practicable, as well as any claim which may be presented for bringing the money into court.

“J. E. Jones, President Central Georgia Bank; The Central Railroad and Banking Company of Georgia, by R. F. Lyon, its attorney; Lanier & Anderson, attorneys for City National Bank, Chattanooga, Tennessee; William Keith and William Fairbanks, S. S. Dunlap, Jacobs, Cunningham & Company, by their attorney, A. Proudfit; Henry L. Jewett, President of the Capital Bank, Macon, Georgia; R. W. Cubbedge, President Macon Bank and Trust Company, Macon, Georgia; Nisbet, Bacon & Hines, attorneys for Exchange Bank; Daniel Bullard, G. W. Grafflin, J. C. Grafflin & Company, J. R. Brumby, C. M. Wiley, George W. Burr, R. H. Flanders; Whittle & Gustin, attorneys for R. W. and Anna L. Fort; F. H. Alley, Johnson & Smith, John B. Wiley, H. & F. Blandy, by their attorney, Robert A. Nisbet, (according to terms as expressed in the decree of the court;) Wooten & Simmons, attorneys for Ricks; Poe, Hall & Lofton, attorneys for Guilkenen & Sloss; L. J. Guilmar-tin & Company, Ogden Brothers, Reed & Tully, Hough & Company, J. A. Foster & Company, Foster Brothers, Sauls-bury, Respass & Company, as creditors of Burr & Flanders, and not of C. M. Wiley.”

Whereupon the court passed an order that in pursuance of said consent and agreement, that the fund should be divided and distributed amongst said creditors in the manner, and in the proportion, as specified in said agreement. Acting under said agreement and order of the court, the committee made their report, in which they refused to allow the claims of certain creditors, which, in their judgment, ought not, from the evidence before them, to be allowed according to the terms of said agreement. The parties whose claims were disallowed, objected to the action of the committee in respect to their

claims, and were about to file a bill to enjoin the committee from further proceeding to distribute the assets of Burr & Flanders, when it was agreed by said committee, and the parties interested, that said committee should report their decision and action in the premises to the court, just as if a bill had been regularly filed as threatened, for such direction and decree as said court could make, had such bill been filed, and no more; the right to object to the jurisdiction of said court to review or set aside the judgment of said committee respecting the matters aforesaid, being reserved and not waived. The report of the committee in respect to the rejected claims, was then submitted to the court, which the court set aside, to which decision the plaintiffs in error excepted.

1. Was it competent for the court, and did it have the legal power and authority to set aside the report of the committee on the statement of facts and pleadings then before it? In our judgment, it had not. There was no bill or petition presented to the court containing allegations which would have been sufficient in law or equity to have set aside the report of the committee. It is not even stated on what grounds the threatened bill to set aside the report of the committee was to be based; only that the parties whose claims were rejected, objected to the rulings and action of the committee, but whether their objections were founded on any valid legal or equitable grounds, did not appear. There were no pleadings before the court which would have authorized it to have rendered a judgment or decree thereon, setting aside the report of the committee upon any valid legal or equitable grounds.

2. But it is said the parties consented. The reply is that the 21st rule of court declares that "no consent to dispense with pleadings will in any case be allowed." The 20th section of the Code also declares that "the rules of the respective courts, legally adopted, and not in conflict with the constitution of the United States, of this state, or the laws thereof, are binding and must be observed." It is true that the rule of court above cited, is a common law rule, but the reason and spirit of it is as applicable to cases pending in the

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one court as the other, especially as the jurisdiction of the two courts in this state is so nearly assimilated in practice. Besides, the public interest requires that the records of the courts should show what issues have been made and determined therein for the protection of the rights of the citizens of the state. We therefore reverse the judgment of the court below, with leave to the objecting creditors to file their bill or petition, if they may think proper, to set aside the report of the committee upon such legal or equitable grounds as they shall be advised, embodying therein the evidence had before the committee in respect to the rejected claims of the complaining creditors.

Judgment reversed.

THE SOUTH GEORGIA AND FLORIDA RAILROAD COMPANY,
plaintiff in error, *vs.* DAVID AYRES, defendant in error.

1. Affidavit, substantially in terms of the rule of court, in reference to the loss or destruction of a deed or other instrument between the parties, is proper as preliminary to admitting a copy in evidence.
2. In a suit by a corporation to collect capital stock subscribed, evidence of the value of that or any other stock is irrelevant. And it is not necessary to show that a certificate of stock, or other evidence of ownership, has been tendered to the subscriber, or that the corporation has received the amount of stock authorized by the charter, or (in the absence of a plea in abatement) that the corporation has been organized and is still alive.
3. If a corporation, chartered to construct and carry on the business of a railroad, sells the road without authority of law to another company, it cannot collect unpaid subscriptions of stock from subscribers who did not consent to the sale.
4. When stock is, by contract, payable in installments as called for by the board of directors, the calls should be clearly proved, and the recovery should be limited to the aggregate amount of the several calls not met by payment.
5. Exceptions entered *pendente lite* will not be acted upon in the supreme court while the case is pending below, especially where the excepting party fails to assign errors thereon as required by the Code, section 4250.

Evidence. Practice in the Superior Court. Corporations. Stock. Practice in the Supreme Court. Before Judge WRIGHT. Mitchell Superior Court. May Term, 1875.

Reported in the opinion.

WARREN & HOBBS; J. H. SPENCE, for plaintiff in error.

P. J. STROZER; D. H. POPE; H. MORGAN, for defendant.

BLECKLEY, Judge.

Plaintiff recovered, and the court granted a new trial. The action was brought in the short statutory form to recover a balance of the defendant's subscription to the capital stock of the South Georgia and Florida Railroad Company. The declaration was originally in the name of certain persons, describing themselves as president and directors, doing railroad business under the name, firm and style of the "South Georgia and Florida Railroad Company." It alleged that the defendant was indebted to them in the sum of \$500 00 on a subscription, and referred to a copy annexed, but there was no copy annexed, only a bill of particulars. The bill of particulars debited the defendant with six shares of stock (\$600 00,) and credited him by two installments of \$50 00 each. Pending the case, at May term, 1873, an amendment was made adding four persons to those named as directors, and stating the company to be an incorporated company of this state, having the right to sue and be sued in the corporate name set forth in the original declaration. The amendment also set out a new bill of particulars, less in amount by \$40 00 than the former, and divided into ten installments—two of \$50 00 paid; two more of \$50 00 unpaid, and six of \$80 00 unpaid. It alleged that the defendant's indebtedness was by contract of subscription for six shares of the corporate stock, payable in three installments.

At May term, 1874, the defendant demurred generally to the declaration as amended, and the demurrer was overruled.

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At the same term the plaintiff further amended the declaration by alleging that there was a subscription list, (describing it and annexing a copy;) that the defendant subscribed for capital stock of the company amounting to \$600 00, to be paid in such installments as should be called for by the directors; that the installments had, from time to time, been called for, and that the defendant had not paid, but had refused to pay the same.

The defendant objected to the allowance of this amendment because there was no cause of action set forth in the original declaration, and there was, therefore, nothing to amend by; and because the amendment introduced a new cause of action. The objection was overruled and the amendment allowed. This decision of the court, and the judgment overruling the demurrer to the declaration as it stood prior to making the amendment, were excepted to, and the exceptions were certified and entered *pendente lite*, under sections 4250 and 4254 of the Code.

The case was tried at May term, 1875. In accounting for the non-production of the original subscription list the plaintiff examined certain witnesses as to the loss of the paper, search therefor etc., and read to the court the affidavit of the president and the secretary of the corporation, in which they deposed that the list had been lost or mislaid, so that it could not be found; that it was not in their power, custody or control, and that they knew not where it was. The court admitted secondary evidence; and a substantial copy of the paper, proved to be such, was placed before the jury. Demand upon the defendant for his installments was shown, and his refusal to pay any but the first two. It did not appear, however, when the demand was made, whether before or after the suit was brought, or how many installments the directors had called for, or when the several calls were made, or what was the amount of each, or the aggregate amount of all.

There is no plea in the record, but the main contest at the trial seems to have been over the question whether the defendant was discharged from liability on his subscription by

reason of some disposition made, without his consent, of the company's road or of the capital stock. One of the plaintiff's witnesses, a director named among those in the declaration, testified that the road was transferred to the Atlantic and Gulf road, he thought, but was not certain—thought it was done, or agreed to be done, at the time defendant subscribed for stock. The defendant testified that he paid installments as they fell due until the company transferred their stock and road to the Atlantic and Gulf road without his consent. He had heard of the transfer, but did not, even at the trial, otherwise know of it. He refused to pay any more as he did not want stock in the latter road.

The court charged the jury that the plaintiff's charter allowed the company to connect with other railroad companies, and the transfer of the road to the Gulf Road would not release the defendant; that, if the defendant subscribed for stock as alleged, he was liable, unless some good defense was pleaded and proved; and that the transfer of the road would not relieve him if made by the proper officers and board of directors, although made without his consent.

The jury found for the plaintiff \$500 00 with interest and costs. A new trial was applied for on several grounds, and granted generally. The grounds, besides the usual ones of conflict with law and evidence, were that the court erred in the above charge; in admitting the before recited affidavit of the president and secretary, and in refusing to admit evidence of the value and depreciation of the stock; that no certificate of stock or other evidence of title had been tendered to the defendant; that it was not shown that the corporation had ever been organized, or was a subsisting live company, or that it had ever received the amount of stock authorized by the charter; and that the charter did not authorize a transfer of the road to any other company; also, that the court erred at a previous term in allowing the amendment made which had been excepted to *pendente lite*.

1. There was no error in hearing the affidavit of the president and secretary touching the loss of the subscription list.

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The affidavit was substantially in the terms prescribed by the rule of court, and was heard by the court as preliminary to admitting a copy of the lost instrument, and was not put as evidence before the jury.

2. In a suit to collect capital stock from a subscriber, evidence of the value of that stock or of any other stock is irrelevant; nor is it necessary to show that a certificate of stock or other evidence of ownership has been tendered: 41 *Georgia Reports*, 597; or that the corporation has received the amount of stock authorized by the charter; or (in the absence of a plea in abatement) that the corporation has been organized and is still alive: 32 *Georgia Reports*, 273; 4 Eng. L. & Eq. R., 455. *Contra*, in tendency as to amount of stock, Redfield on Railways, section 51.

3. We think the court erred in charging the jury that a sale of the road by the corporation would not be a defense to the stockholder. No authority for selling the road has been produced to us; and if the corporation, chartered as it was to construct and carry on the business of a railroad, sold out the road and discontinued that business, it had no right to collect from unwilling subscribers their unpaid subscriptions. It will not do to say that the proceeds of the road took the place of the road itself, and that the stockholder's *pro rata* ownership in the proceeds would be supposed to be of equal value, and therefore of equal benefit to the stockholder. Stock in a railroad owned and worked by a corporation is a very different thing from the right to a share of the money which would accrue from a sale of the road. An attempt was made in the argument to uphold the judge's charge by reason of supposed authority given by the charter to incorporate the stock of this company with that of any other railroad company. But the charge was not on that subject; it related to a sale of the road, and not to incorporating the stock with that of some other company; neither was there any evidence before the jury that the stock had been so disposed of. It will be time enough to rule on the power

claimed for the corporation in this respect when it is shown that an effort has been made to exercise it.

4. The defendant's subscription was, by its terms, payable in such installments as might be called for by the board of directors, under the provisions of the charter. On the matter of calls, there was not enough evidence before the jury to justify the verdict. It did not appear that all the unpaid stock had been called for, or what number of calls had been made, or the amount thereof severally, or in the aggregate. We should regard the grant of a new trial quite proper if this were the only reason for it.

5. As the case is left still pending below, to be tried again, we shall forbear to rule on the matters embraced in the defendant's exceptions entered *pendente lite*. If they cover errors, the court below may yet correct them for itself; or the verdict of the jury may be in favor of the defendant, and leave no occasion for us to deal with them. Besides, error has not been assigned on these exceptions, in this court, by the defendant, as the Code seems to require, section 4250. We affirm the judgment granting a new trial, and suggest that, when the case is re-tried, some effort be made to give greater certainty to the evidence, especially upon the real character and scope of the transaction between this company and the Atlantic and Gulf Railroad Company.

Judgment affirmed.

ROBERT JACKSON, plaintiff in error, vs. THE STATE OF
GEORGIA, defendant in error.

1. Deceased was shot on Tuesday night and died Saturday following. During his illness on Friday and previously, he said he was "certain to die," and then said defendant shot and killed him, stating some of the circumstances. The court admitted the statements, and instructed the jury that it was for them to say whether they were dying declarations made in the article of death:

Held, that the court ruled correctly.

SUPREME COURT OF GEORGIA.

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n, in addition to these dying declarations, there is other direct testimony to the crime, and this testimony and other circumstances show defendant's guilt:

that the evidence is ample to sustain the verdict.

criminal law. Evidence. Dying declarations. New trial. Judge PATE. Dooly Superior Court. September term, 1875.

Reported in the opinion.

GUERRY & SON; GEORGE V. BUSBEE, for plaintiff in error.

ROLLIN A. STANLEY, solicitor general, by JOHN MILLIDGE, for the state.

JACKSON, Judge.

The defendant was indicted for murder and found guilty. He moved for a new trial on two grounds; first, because the court erred in admitting statements of deceased as dying declarations; and secondly, because the verdict is without evidence and against the evidence. The court refused the new trial and defendant excepted, and brought the case here.

1. Were the statements properly ruled in as dying declarations? There can be no doubt that deceased thought he would die. He said so to the two persons who testified to his statements. He said "he was certain to die," and called upon the Lord to have mercy upon him. He was shot on Tuesday night and died the next Saturday. Some of the statements were made Friday; others at an earlier period; but when he made each time he said he felt he would die. The court ruled the sayings in, but instructed the jury that it was for them to say, under the facts, whether they were made "*in articulo mortis*," and to pass upon them in the light in which they viewed them, whether in the article of death or not. We think their admission and this instruction right: Code, section 3781; 11 *Georgia Reports*, 353.

2. In regard to the second point, we think that the tri-

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mony is abundant to show his guilt. Independently of the dying declarations, one witness swears that he saw the defendant shoot. He was keeping deceased's wife; had been shot about it himself a short time before, and not only the direct evidence but all the circumstances show that he waylaid deceased and deliberately shot him down from ill-will and malice.

Let the judgment be affirmed.

MARTHA CARTER, plaintiff in error, vs. THE COTTON STATES LIFE INSURANCE COMPANY, defendant in error.

A policy of insurance provided that the annual premium was to be paid by an annual loan of \$100 00 and a cash annual premium of \$107 30. It was conditioned to be void if the premiums due shall not be paid at the time stated. The application declared that the policy should not be binding until the first premium shall have been received by the company, during the lifetime and good health of the person insured. The agent of the company contracted with the insured that the first year's premium was to be paid in services to be rendered by the insured to the company as medical examiner, and that if such services exceeded the first year's premium, a credit was to be entered for the excess on that of the next. The insured died during the first year, having rendered service as medical examiner to the time of his death, but the fees did not amount to the first year's premium:

Held, that the agent of the company exceeded his authority in making the contract above stated, and that the beneficiary of the policy was therefore not entitled to recover thereon.

Insurance. Principal and agent. Contracts. Before Judge BARTLETT. Richmond Superior Court. October Term, 1875.

Reported in the decision.

WILLIAM H. HULL, for plaintiff in error.

BARNES & CUMMING, for defendants.

WARNER, Chief Justice.

This was an action brought on a policy of life insurance for \$5,000 00, issued by defendant and made payable to plaintiff,

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he life of her husband, Dr. Flournoy Carter. The policy dated November 25, 1872, and was delivered to Dr. Carter.

Carter died of pneumonia, July 18, 1873. Notice of death defendant was shown, and its sufficiency not objected to. The refusal of the company to pay was based on the fact that Dr. Carter had never paid the first cash premium, or given any note for the portion of the first year's premium which was to be a loan.

The case of the plaintiff was, that by an agreement with M. W. Abney, the company's agent who took the risk and delivered the policy to Dr. Carter, the premium for the first year was to be paid by services to be rendered the company, as a medical examiner in Augusta; and that Dr. Carter did render such services, whenever called on, until prevented by death.

The clauses of the policy essential to be stated are as follows: "The Cotton States Life Insurance Company, in consideration of the representations for this policy, signed by Flournoy Carter, and dated November 8th, 1872, and numbered as this policy, and an annual premium of \$207 30, to be paid on or before the 25th day of November in each and every year from the date of and during the continuance of this policy; which annual premium is to be paid in manner following: an annual loan of \$100 00, and a cash annual premium of \$107 30, to be paid on the 25th day of November, do assure," etc., (and agrees to pay) the "said sum insured (the balance of the year's premiums on this policy, if any and also all notes or credits for premiums thereon, and other indebtedness of the insured to this company, being first deducted.)"

Conditioned to be void—"If the premiums due on this policy shall not be paid at the times above mentioned, and interest on all notes or credits for premiums on this policy paid annually in advance to this company, or its authorized agents."

The following is the essential part of the "application" the insured referred to in the policy: "It is declared * *

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that the policy of insurance hereby applied for shall not be binding on this company until the first premium, as stated therein, shall have been received by said company, or some authorized agent thereof, during the lifetime and good health of the person therein insured; and inasmuch as only the officers at the home office of the company in the city of Macon, Georgia, have authority to determine whether or not a policy shall issue on any application, and they act on the written statements and representations referred to, it is expressly understood and agreed that no statements, representations, or information, made or given to the person soliciting or taking this application for a policy, shall be binding on the company, or in any manner affect its rights, unless such statements, representations or information be reduced to writing, and presented to the officers of the company, at the home office, in the application above."

On the back of the application was the following entry, unsigned:

AGENT'S MEMORANDUM—PREMIUM AND SETTLEMENT.

Table premium,	\$. . .
Less—loan twelve months' note,	100 00
Balance,	107 30
Policy fee and stamp,	1 00
First cash payment,	\$108 30

It was proved, on the part of the plaintiff, that Abney was the agent of the defendant for taking risks in Augusta; that the agreement above stated was made between him and Doctor Carter; and that Doctor Carter did, in pursuance of the agreement, examine a number of applicants for insurance; also, that Doctor Ford, after Doctor Carter was taken sick, examined several for him and for his benefit.

The fees for these examinations, however, did not amount to the first year's premium.

There was a variance between witnesses as to one point of this agreement. The plaintiff, stating what her husband had told her, confirmed by what Abney told her, said that the

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year's services were to go against the year's premium, without regard to their amount.

A witness named Howard, examined by interrogatories at plaintiff's instance, which were introduced by defendant, said it was this: that if the services in a year exceeded the premium, he was to be credited for the excess on next year's premium, and that nothing was said of the contingency of a deficiency. The same witness stated that after the policy was delivered, Abney asked Carter to give a due-bill for the difference between the first year's cash premium and the services already rendered, which Carter refused, saying he meant to hold him to his bargain, upon which Abney said he would make it all right.

Howard also testified that in the spring of 1873, Dr. Carter came to him in an excited manner and showed him a letter from Mr. Obear, which was a dun for the premium. He said witness knew his agreement with Abney, that he was to pay the premium in services, and now they were dunning him and had not even given him credit for the services performed. Witness took the letter and showed it to Abney, who said he was about to send in his report which would make it all right and sent a message to Carter (which witness delivered) to pay no attention to the letter. The custom of the local agents was out of \$100 00 premium to keep \$20 00 for their commission; to pay \$5 to the medical examiner and send \$75 00 to Abney. In the cases when Dr. Carter examined, they kept \$20 00 for themselves and sent \$80 00 to Abney. This witness, Howard, was a sub-agent under Abney, and had brought Abney and Carter together to make the agreement referred to. Abney lived in Edgefield, South Carolina, and had sub-agents in Augusta.

George S. Obear, the secretary of defendant, testified that Abney was the company's agent for South Carolina, with the right to go into any territory; that he had the same powers as the other agents, which were to receive applications and forward them to the home office; if approved, to deliver the policies and receive the premiums; that he had no other powers;

that he had no authority to make such a contract as the one set up by plaintiff; that no custom of this company, or any other, as far as witness knows, authorized agents to receive anything but money for premiums. The witness, Obear, said that no information as to this alleged agreement was received by the home office until after Dr. Carter's death. It was the custom of the company, when a policy was issued and sent to the agent, if the return of the premium was not made at the proper time, to write to the person insured and notify him, and if he did not pay to notify him that the policy was avoided.

The paper, of which the following is a copy, was produced by plaintiff, under notice, with the statement that it was received during Dr. Carter's extreme illness, and for that reason was never shown to him :

"MACON, GEORGIA, June 17th, 1873.

"*Mr. Flournoy Carter* : Please fill up the blank spaces below, referring to your policy in this company, and return and oblige. If payment has not been made, please state that fact.

"GEORGE S. OBEAR, *Secretary*.

"No. | Premium. | Interest. | Due. | To whom paid. | When paid."

"Policy holders are requested to pay promptly on the day premiums become due. When it is not convenient to pay to authorized agents, payment may be made direct to the company, by check or draft, by post-office order or by express."

This was the form of the one sent in April, 1873, referred to by Howard.

Defendant also read a letter dated July 18, 1873, to Dr. Carter, notifying him that his policy was void. This letter was not received till after Dr. Carter's death.

The court refused to charge, as requested in writing, by plaintiff's counsel: "That if the agent of the company agreed with Dr. Carter that the premium should be paid in medical services as examiner, and Carter agreed to render such services in consideration of the policy, and Carter did render such services, when called on, until hindered by sickness and death, the policy is binding on the defendant."

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he court did charge, at request of defendant, as follows:
1st. An agent of an insurance company, whose agency extends only to procuring applications, forwarding them to the home office, countersigning and delivering policies, and receiving premiums, has no authority to make a contract of insurance or to modify the terms of a policy.

2d. A recital in the application for insurance (said application being signed by the insured) in the words following, to-wit: "and inasmuch as only the officers at the home office in Macon have authority to determine whether or not a policy shall issue to any applicant," is notice to the applicant that such an agent as the above described has no power to make or modify a contract.

3d. An agent appointed to solicit and forward to the home office applications for insurance; to receive from the home office the policies of insurance, and to countersign them and to receive the premiums which, by the policy, are required to be in cash, whilst he may waive the cash payment, his delivery of the policy without such payment, and without the execution and delivery of the note on account of first premium would not by itself bind the company. Still less has such agent authority to make a different contract as to the mode of payment of the premium, and a contract for a premium different in kind and amount.

4th. A contract to receive medical services in lieu of a premium without reference to their value in the aggregate and with no provision for payment of the difference between the value of such services and the amount of the premium is not merely a waiver of payment of a stipulated sum in cash but is a contract for a different kind and amount of premium. Such a contract exceeds the powers of such an agent.

5th. If, in the agreement made by Carter with Abney, the former looked to Abney individually, the plaintiff cannot recover from the company.

6th. The policy of insurance, and the application thereon, insured, are to be construed together as one contract; in the application there is a provision that the policy

not be binding on the company until the first premium shall have been received, such provision in the application is a part of the policy.

7th. If there was an agreement between Carter and Abney, defendant's agent, that the premium should be paid in medical services, as examiner for defendant, such agreement only bound Abney, individually, and was not binding on the company.

8th. That if the jury believe from the testimony that no note was given by Carter for the loan part of the premium, the policy did not take effect, and was not binding on defendant.

Under this charge the jury found for defendant, and plaintiff excepted and assigns the same as error.

The main controlling question in this case, in view of the foregoing statement of facts, is whether the defendant was bound by the acts of its agent, Abney, in making the contract for insurance, which the plaintiff now seeks to enforce against it. The question is not whether the policy would be binding on the defendant if its agent had given to the insured credit for the payment of the first premium to be paid to obtain the policy, but the question is whether its agent had the authority to bind the defendant by the contract which he did make with the insured, that the premium due on the policy for the first year was to be paid by the insured, by services to be rendered to the defendant as medical examiner in Augusta; that if his services in a year exceeded the first year's premium, he was to be credited for the excess on the next year's premium. This is substantially the contract which Carter, the insured, made with Abney, the defendant's agent, to obtain the policy now sued on. The general rule is, that the principal is only bound by the acts of his agent when the latter acts within the scope of his authority. To establish the liability of the defendant for the payment of the policy now sued on, the case of *Miller vs. Life Insurance Company*, 12 Wallace's Reports, 285, was cited on the argument by the plaintiff in error. The point decided by the court in that

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case was, that where an insurance company instructed its agents not to deliver policies until the whole premiums are paid, "as the same will stand charged to their account until the premiums are received," and the agent did, nevertheless, deliver a policy giving a credit to the insurer and waiving a cash payment, that the company—it being a stock company—was bound for the payment of the policy. The question in that case was, whether the defendant's general agent, under his instructions, could waive the present payment of a cash premium prior to the issuing of the policy so as to bind the company. The question in the case now before us, is not whether the defendant's agent could have waived the immediate or present cash payment of the first premium for a short time, when he issued the policy to the insured, so as to bind the defendant's company, but the question here is, whether the defendant's agent had the authority to make the contract he did with the insured, that the first premium should be paid in services to be rendered as a medical examiner for the defendant, as shown by the evidence in the record, so as to bind the defendant for the payment of the policy? This precise question was decided in the case of the Anchor Life Insurance Company *vs. Pease*, reported in Bigelow's *Life and Accident Insurance R.*, 4th vol., 215. Although it does not appear from the report of that case that the contract made with the insured that the premium to be paid in services as examining physician, was the first premium due on the policy, still the principles recognized and decided by the court in that case, in respect to the authority of the agent to make such a contract, is as applicable to the first as subsequent premiums. The decision of the court, in the case last cited, appears to be based on sound legal principles as enunciated therein, and for that reason we adopt them, as being applicable to the case before us, in rendering our judgment. The contract made by the insured with the defendant's agent, was of an extraordinary character, not shown to have been customary, or within the scope of the powers of such agents, but on the contrary, the uncontroverted evidence in the record is, that the agent had no authority to

such a contract; besides, it would seem from the evidence that the insured must have been aware of that fact he appealed to the agent, instead of the company, when he demanded the payment of the premium from him; so when the agent demanded his due-bill for the difference between the first year's cash premium and the services rendered, the insured said he meant to hold him, that to his bargain, and refused to give his note. The payment of premiums in cash by the insured in a life insurance company, is an important element in conducting the business of such companies, and if the agents thereof shall be allowed to contract with the insured for the payment of premiums in cash for services to be rendered the company, why not be allowed to contract for the payment of premiums in horses and carriages for the agents to travel over the country to procure business for the benefit of the company? The only safe rule is to adhere to the well established principles of the law in all cases where it can be ascertained, though it has been said that hard cases make shipwreck of the law, and that rule is probably quite as applicable to the law governing life insurance contracts as any other. In the view which we have of the contract sued on in this case under the evidence, the law applicable thereto, the plaintiff was not entitled to recover, and although we think the court did err in some of its charges to the jury, still, the charge of the court being correct on the main controlling question in the case, the errors in the other matters complained of are immaterial. The judgment of the court below be affirmed.

JOSEPH ROBERTSON, plaintiff in error, vs. ALEXANDER F. PHARR, defendant in error.

In order to entitle a party to have a judgment entered on the minutes *non est*, he must show when it was rendered, at what term of the court, if on what day of the term.

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case was, that where an insurance company instructed agents not to deliver policies until the whole premiums paid, "as the same will stand charged to their account until the premiums are received," and the agent did, nevertheless deliver a policy giving a credit to the insurer and waiving cash payment, that the company—it being a stock company—was bound for the payment of the policy. The question in that case was, whether the defendant's general agent, under his instructions, could waive the present payment of a cash premium prior to the issuing of the policy so as to bind the company. The question in the case now before us, is whether the defendant's agent could have waived the immediate or present cash payment of the first premium for a short time, when he issued the policy to the insured, so as to bind the defendant's company, but the question here is, whether the defendant's agent had the authority to make the contract he did with the insured, that the first premium should be paid in services to be rendered as a medical examiner for the defendant, as shown by the evidence in the record, so as to bind the defendant for the payment of the policy? This precise question was decided in the case of the Anchor Life Insurance Company *vs.* Pease, reported in Bigelow's Life and Accident Insurance R., 4th vol., 215. Although it does not appear from the report of that case that the contract made with the insured that the first premium to be paid in services as examining physician, and the first premium due on the policy, still the principles recognized and decided by the court in that case, in respect to the authority of the agent to make such a contract, is as applicable to the first as subsequent premiums. The decision of the court, in the case last cited, appears to be based on sound legal principles as enunciated therein, and for that reason we adopt them, as being applicable to the case before us, in rendering our judgment. The contract made by the insured with the defendant's agent, was of an extraordinary character, and shown to have been customary, or within the scope of the powers of such agents, but on the contrary, the uncontroverted evidence in the record is, that the agent had no authority

make such a contract; besides, it would seem from the evidence, that the insured must have been aware of that fact when he appealed to the agent, instead of the company, when the latter demanded the payment of the premium from him; and also when the agent demanded his due-bill for the difference between the first year's cash premium and the services then rendered, the insured said he meant to hold him, the agent, to his bargain, and refused to give his note. The payment of premiums in *cash* by the insured in a life insurance company, is an important element in conducting the business of such companies, and if the agents thereof shall be allowed to contract with the insured for the payment of premiums in medical services to be rendered the company, why not be allowed to contract for the payment of premiums in horses and buggies for the agents to travel over the country to procure insurance for the benefit of the company? The only safe rule is to adhere to the well established principles of the law in all cases where it can be ascertained, though it has been said that hard cases make shipwreck of the law, and that remark is probably quite as applicable to the law governing life insurance contracts as any other. In the view which we have taken of the contract sued on in this case under the evidence, and the law applicable thereto, the plaintiff was not entitled to recover, and although we think the court did err in some of its charges to the jury, still, the charge of the court being right, on the main controlling question in the case, the errors in relation to the other matters complained of are immaterial.

Let the judgment of the court below be affirmed.

LENNETT ROBERTSON, plaintiff in error, vs. ALEXANDER F. PHARR, defendant in error.

1. In order to entitle a party to have a judgment entered on the minutes *nunc pro tunc*, he must show when it was rendered, at what term of the court, if not on what day of the term.

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2. When a case stands on the docket as undisposed of, and no entry on the papers or elsewhere is produced indicating any disposition of it, a final judgment cannot be entered *nunc pro tunc* on parol testimony alone, unaided by the judge's recollection, where counsel for one of the parties denies on oath all knowledge of the alleged judgment, and there is no positive affirmative evidence but that of the adverse counsel.

Judgments. Amendment. Before Judge CLARK. Sumter Superior Court. October Term, 1875.

Reported in the opinion.

C. F. CRISP; N. A. SMITH; M. R. STANSELL, for plaintiff in error.

W. A. HAWKINS, for defendant.

BLECKLEY, Judge.

A judgment was rendered in July, 1867. Execution issued thereon, was levied upon certain land, as defendant's property, in August, 1869. In September thereafter the defendant filed an affidavit of illegality on two grounds: first, that he was never served with the declaration or process, never acknowledged service and never appeared, nor did he even know anything about the proceedings; second, that the consideration of the debt was slaves. The case was entered on the illegality docket at October term, 1869. In January, 1875, the court passed an order reciting that the "illegality had been lost, and directing that, if not established by the next term the same should be dismissed; and ordering, also, that the plaintiff establish the original declaration, or, failing to do so, and it should be needed, that the case should be dismissed. An order establishing the declaration, process, officer's return of service, verdict and judgment, with other entries on the declaration, was passed in the same month of January. At October term, 1875, the defendant moved to enter upon the minutes a judgment which he alleged had been rendered by the court at a previous term, sustaining the illegality. The question was, whether such a judgment had,

in fact, been rendered, and if so, when? On going into evidence it appeared that the case stood on the illegality docket just as it was originally entered. The judge had neither marked it out nor made any memorandum concerning it. There was no writing whatever produced that afforded any hint or intimation that the case had ever been disposed of. The original illegality papers were found and were before the court. They showed no judgment against the plaintiff for costs nor anything else on the matter in question. The movant supported his motion wholly by parol testimony. Colonel Hawkins, his attorney, testified that he was certain the case was called, and that he took an order sustaining the affidavit of illegality, in substance the same as that now proposed to be entered *nunc pro tunc*; that he had a pretty clear recollection of drawing the order; and that his recollection was, that on the calling of the case, it was announced that the note, which was the foundation of the execution, was given for slaves, and that the order was taken. The deputy sheriff who made the levy, testified that he thought he was in court when the case was called with some other similar cases, and that his remembrance was the affidavit was sustained. The movant himself testified that the plaintiff's attorney told him the execution was dead, and offered to receipt it in full if witness would pay his fee; that he thought this was after the case had been called in court, the illegality sustained, and the order sustaining it taken, but was not certain. On the other hand, the plaintiff's attorney testified that, after the constitution of 1868, he supposed the execution was dead, and did offer to receipt in full if movant would pay his fee, but he never knew the execution had been levied, or that any illegality was taken; that he was present in court most of the time during the call of the dockets, and had no notice of the case ever having been taken up; and that if any such order was ever granted it was without his knowledge or consent. The deputy clerk testified that he had been in office several years since 1869, a part of the time as deputy sheriff, and that he did not remember that the illegality docket had been

called since that year ; that all late cases of illegality were entered on the issue docket.

1. On this evidence, chiefly on that of Colonel Hawkins, as the judge certifies, the court granted the motion ; and a judgment sustaining the illegality was entered on the minutes *nunc pro tunc*. But it was entered as of no particular day or term. The evidence does not show when it was rendered. For that reason, if there were no other, we think the court erred. A judgment is too important a matter to float at large in a stream of time six years wide. Important rights may depend on its date. The term, at least, if not the day of the term when it was rendered, should appear. Unless that much certainty can be imparted to it, it is too loose to become a record. When a suitor claims to have recovered a judgment, he must show with reasonable certainty when he recovered it. If he asks to have it entered "now for then," it must be known what term "then" applies to. Now for then ! No for when ?

2. But the evidence that any judgment was rendered at all was altogether in parol. None of it was positive except that of the attorney for one of the parties. The attorney for the other party denied all knowledge of the matter. It does not appear what judge was presiding, or that he did or could aid the evidence by his own recollection. The docket was silent, the minutes of the court were silent ; no entry on the papers or elsewhere hinted at such a judgment ; the paper, drawn up as a judgment at the time, had not been preserved ; there was absolutely nothing but memory to depend upon. A court of record speaks by its records. It would be dangerous in the extreme to shape its records by the unaided recollection of one of the counsel, however clear and positive his recollection might be. Conceding, as we do, to Col. Hawkins the purest and most unimpeachable veracity, there was not enough evidence before the court to establish the rendition of a judgment. Neither his memory nor that of any other private person ought to be accepted as a substitute for a record, or as the equivalent of record evidence. We cannot recognize memory

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is serving, for years, the purposes of the minutes of court. It is far better to abide by the docket, and let the case be disposed of accordingly.

Judgment reversed.

JOHN G. WINTER *et al.*, plaintiffs in error, *vs.* THE EAGLE AND PHENIX MANUFACTURING COMPANY, defendant in error.

1. This court will not control the discretion of the circuit court in granting a new trial unless that discretion has been grossly abused. The case will be tried again, and nobody can be badly hurt.
2. Newly discovered testimony to the effect that the ancestor of the plaintiffs signed, as secretary of the Rock Island Paper Mills Company, a mortgage of the property sued for, is pertinent, and sufficient to authorize the grant of the new trial, when defendant claims under said Rock Island company, and plaintiffs, as heirs of the ancestor; and when such evidence is supported by the affidavits of the parties who negotiated in respect to the mortgage, tending to show that the ancestor had, prior to said mortgage, made a deed in fee to the property mortgaged to said Rock Island Paper Mills Company.
3. Nor can the defendant or its counsel be fairly charged with want of diligence in not sooner finding the record of the mortgage and the signature of the secretary thereto; its title was a deed from one McAllister who bought of the Rock Island Company, and it can hardly be said that it was so grossly negligent in not searching the mortgages made by one not its immediate vendor, as to require this court to hold that the judge below grossly abused his discretion in not withholding the grant of the new trial for want of diligence on its part.

New trial. Before Judge BUCHANAN. Muscogee Superior Court. November Term, 1875.

Reported in the opinion.

BLANDFORD & GARRARD, for plaintiffs in error.

PEABODY & BRANNON; JAMES JOHNSON, for defendants.

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JACKSON, Judge.

On the trial of this case the jury found for the plaintiffs on a chain of title from the state to their father. The defendant showed title from the Rock Island Paper Mills Company to one McAllister and from him to them. Some parol proof was also introduced by the defendant, endeavoring to show thereby, that they had built on the lot in controversy and expended large sums of money thereon within the knowledge of plaintiffs, or their father, under such circumstances as to make it inequitable in them to recover the land with the improvements; but for the purpose of illustrating the reasons for this decision it is unnecessary to go into that proof or to consider its legal effect. Other questions are also made in the motion for a new trial which we do not consider because it is unnecessary, the new trial having been granted below on the newly discovered testimony alone, and our view of that ruling controlling the case, at least the grant of this motion, without considering the other grounds.

1, 2. The motion is based upon the discovery by the defendant, since the trial, of a mortgage deed made by the Rock Island Paper Mills Company, to the Mechanics' Bank of Augusta, *signed by George W. Winter*, the father of the plaintiffs, and as whose heirs-at-law they sued, *as secretary of the Rock Island Paper Mills Company*. The significance of this testimony lies in the fact that the Rock Island Company sold the land to McAllister and McAllister to defendant. The fact that George W. Winter, in whom the fee to this land was vested, should sign a mortgage to the same, acknowledging the fee in another, so far as his signature as secretary of the other could do so, is a circumstance which might have great weight with the jury, in connection with the other circumstances of the case, tending to cast suspicion upon the *bona fides* of the plaintiffs' claim to the land. It is in the nature of an estoppel, and furnished the court below with ground in its judgment, sufficient to grant the new trial. It is supported, too, by affidavits of William T. Gould, the counsel

the Mechanics' Bank, Milo S. Hatch, the president, and Alfred Baker, one of the directors, who, while they do not positively affirm that they ever saw a deed from George W. Winter to the Rock Island Company, depose to facts and circumstances making the presumption very strong in connection with Winter's signature, as secretary, to the mortgage, that such a deed had been made. At all events these affidavits and this discovery rendered it proper, we think, to look further into this important case involving a large and valuable property, and it would be an abuse of the powers vested in this, as an appellate court, to control the court who tried the case from further investigation and another trial thereof.

3. Nor will we control him in his judgment on the question of diligence. Counsel are excusable, perhaps, for not looking into all the mortgages made by the various vendors of this land, and hence in not finding the name of George W. Winter to one of them as secretary. The court below did not hold them to greater diligence, and we will yield to his discretion in this as in the other parts of this ground of the motion for a new trial—the newly discovered testimony and the elements that enter into it as a proper ground for such a motion.

Judgment affirmed.

HIRAM MILLIKEN, plaintiff in error, vs. HENRY H. STEINER,
defendant in error.

1. The charter of a bank provided that the directors should serve until the end of the first Monday in January next ensuing the time of their election, and no longer; that the directors, at the first meeting after their election, should choose one of their number president; that if it should happen that an election of directors should not take place upon the proper day, the corporation should not be deemed dissolved, but the election should be had on some other day. At a meeting of the stockholders, held on December 20th, 1865, the directors were authorized to cause the then president and cashier to execute a deed of assignment. This instrument was made and delivered on January 4th, 1866, by the president and cashier in office at

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the time of the aforesaid meeting of the stockholders. The first Monday in January, 1866, was then passed, and no new board of directors or new officers had been elected:

Held, that the president and cashier before referred to were the proper officers to execute such assignment. They were officers *de facto* if not *de jure*.

2. Section 1494 of the Code providing the method by which an assignment by a bank may be set aside at the instance of creditors, applies only to a case where there has been a voluntary surrender of the charter.

Banks. Officers. Assignments. Before Judge GIBSON.
Richmond Superior Court. October Term, 1875.

Reported in the decision.

AMOS T. AKERMAN, by E. N. BROYLES, for plaintiff in error.

W. H. HULL; FRANK H. MILLER, for defendant.

WARNER, Chief Justice.

This was a claim case, and the record shows the following facts:

On the 19th day of September, 1865, suit was instituted in Richmond superior court on bills of the Mechanics' Bank, and service was perfected on Thomas S. Metcalf, president, personally, on September 23d, 1865. Judgment was rendered January 15th, 1867, for \$8,839 00, based on a verdict of a jury, without any plea, and levied February 20th, 1875, there being on the execution a return of no property, December 9th, 1869; claim was interposed February 23d, 1875.

The following were admissions on the trial;

1st. That the lot of land in controversy was, on the 4th of January, 1866, and for many years before, the property of the Mechanics' Bank, and was so at the date of the levy, unless it had ceased to be by virtue of the facts and proceedings hereinafter shewn.

2d. The deed of assignment, dated January 4th, 1866, from the Mechanics' Bank to William T. Gould, signed by Thomas S. Metcalf, as president, and John A. North, as cashier, with the corporate seal affixed, with acceptance of the trust

an assignee on January 4th, 1866, and recorded January 866. The deed is without preference, conveys the lot on, with all other property of the bank, in trust for the directors of the bank, and authorizes it to be sold in such manner and on such terms as the trustee may deem most for the interest of the trust.

The Mechanics' Bank was incorporated by the act of the legislature, approved December 21st, 1830: Pam. 34, Laws Digest to 1837, page 94.

The charter of said bank was extended by act approved February 20th, 1854, to 1880.

Notice was given December 2d, 1865, by an advertisement signed by J. A. North, cashier, by order of the directors, of a general meeting of the stockholders, December 1865, to consider the condition of the institution.

At the meeting held December 20th, 1865, the following resolutions were passed:

Resolved by this meeting, being a representation of a majority of the stock of said bank, that a general meeting of the stockholders be called, to be held on the 20th day of February next, to consider the propriety and necessity of surrendering the charter.

Resolved, that in the meantime, and to avoid unjust prejudices among the creditors of the bank, the board of directors requested forthwith to cause the president and cashier, and the corporate seal of the bank, to execute and deliver to any person or persons as they may select, a deed of conveyance and assignment of all and singular the estate, goods, effects, evidences of debt, and property of every description, real and personal, in possession and in action, belonging to said bank, reserving what may be necessary to pay officers' salaries, incidental expenses and attorneys' fees, up to the completion of said assignment, in trust for the payment of all the debts and obligations of said bank, without any deduction, except as is provided by law."

b. On the same day the directors met and ordered the assignment to be made as soon as deemed advisable.

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8th. The assignment was made Thursday, January 4, 1866, by the president and cashier with the corporate seal affixed, to William T. Gould, with no other preferences than is or may be authorized by law, and with authority to sell in such manner as the trustee may deem most for the interest of said trust.

9th. A notice was published December 21, 1865, signed by twenty-one of the stockholders, being the owners of over two hundred shares, notifying the stockholders to assemble in general meeting, February 20, 1866, to consider the propriety of surrendering their charter and attending to any other matter touching the interest of said bank.

10th. The stockholders met in convention on February 20, 1866; they ratified and confirmed the proceedings of the preceding meeting, surrendered their charter and ceased to do business, of which action of the stockholders a copy was sent to the Governor of Georgia, who, in his message of March 1, 1866, informed the Senate "that a copy of the proceedings of a meeting of the stockholders of the Mechanics' Bank, ratifying and confirming the proceedings of a previous informal meeting (heretofore communicated) and surrendering their charter," was of file in his office.

11th. The trustee accepted the trust, took possession of the property, held possession until July 6, 1869, when he sold the same at public outcry, at the place of public sales, after due notice of forty days in the public gazettes, to H. H. Steiner, for the sum of \$7,700 00, who has been in quiet and undisturbed possession ever since, under deed from the assignee, recorded July 24, 1869.

12th. There was no election of directors of the Mechanics' Bank, or president of the bank, after January, 1865, and the first Monday in January, 1866, was the first day of the month.

13th. The following are the provisions of the charter of the Mechanics' Bank of December 21st, 1830, relating to the qualifications and authority of the directors and stockholders:

"Section 5. For the well ordering of the affairs of the said corporation, there shall be nine directors, who shall be elected

as soon as gold and silver coin to the amount of twenty per cent. of the subscriptions for said stock shall have been received, and in each and every year thereafter, the directors shall be chosen by the stockholders or proprietors of the capital stock of said corporation, when a plurality of votes given in shall be required to make a choice; and those who shall be duly chosen at any election shall be capable of serving as directors, by virtue of such choice, until the end of the first Monday in January next ensuing the time of such election, and no longer; and the said directors, at their first meeting after each election, shall choose one of their number as president, and in case of his death, resignation, removal from the state, or from the board of direction, the said directors shall proceed to fill the vacancy, by a new election for the remainder of the year.

"And provided further, that in case it should at any time happen that an election of directors should not be made upon any day when, pursuant to this act, it ought to have been made, the said corporation shall not for that cause be deemed to be dissolved; but it shall be lawful on any other day to hold and make an election of directors in such manner as shall have been regulated by the rules and by-laws of said corporation."

Fundamental articles of the constitution of said corporation:

"Section 7, Article 4. Not less than five directors shall constitute a board for the transaction of business, of whom the president shall always be one, except in case of sickness or necessary absence, in which case his seat may be supplied by any director appointed by the board of directors present for that purpose.

"Article 5. A number of stockholders, not less than twenty, who together, shall be proprietors of two hundred shares, or upwards, shall have power, at any time, to call a meeting of stockholders for purposes relative to the institution, giving at least sixty days notice in one of the public gazettes of the city of Augusta, specifying in such notice the object of such meeting.

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"The cashier or treasurer of the bank, before he enters upon the duties of his office, shall give bond with two or more securities, to the satisfaction of the directors, in a sum not less than \$20,000 00, with condition for his good behavior, and the faithful discharge of his duties. * * * *

"The bills obligatory and of credit, notes and other contracts whatever, on the behalf of the said corporation, shall be binding and obligatory upon the said company. *Provided* the same be signed by the president, and countersigned or attested by the cashier of the said corporation." * * *

The court charged the jury: First, that under the admitted facts of this case the assignment was valid, and passed title out of the bank. Second, that if the assignment was not valid, the plaintiff (who was admitted to have been a creditor of the bank at the time,) should have objected to it under the law, in section 1494 of the Code, and not having done so, he could not now object to it, the record of the deed of assignment having been notice to him from the date of the record.

The above charge was given in lieu of the several requests of the plaintiff to charge, which were refused, whereupon the plaintiff excepted. The jury, under the charge of the court, found the property levied on not subject.

1. The claimant purchased the property from the assignee of the bank, for which he paid the sum of \$7,700 00, and took a deed from the assignee therefor, and the main question in the case is, whether the title to the property passed out of the bank by the assignment and vested in Gould, the assignee, so as to enable him to convey it to Steiner, the claimant? The plaintiff insists that at the time the assignment was made by Metcalf, as the president of the bank, under the resolution of the stockholders thereof, that his office as president, by the provisions of the charter, had expired four days prior to the execution of the deed of assignment, to-wit: on the last day of December, 1865. It appears from the evidence in the record that there was no election for directors or president of the bank after January, 1865, and that the first Monday

January, 1866, was the first day of that month. The charter of the bank required that the directors thereof should be elected and be capable of serving as directors by virtue of their office until the end of the first Monday in January next following the time of such election, and no longer; and that the directors, at their first meeting after each election, should elect one of their number as president: *Provided*, that in case no election should at any time happen that an election of directors should be made upon any day when, pursuant to this act, it should have been made, the said corporation shall not for failure to do so be deemed to be dissolved, but it shall be lawful for the corporation on any other day to hold and make an election of directors in the same manner as shall have been regulated by the rules and by-laws of said corporation. What the rules and by-laws of the corporation were is not disclosed in the record now before the court. The charter does not declare that the acts of the president and directors, when not re-elected on the day prescribed, shall be void; but on the contrary, the proviso inserted manifestly contemplates that their acts shall not be void. In our judgment, inasmuch as the resolution of the stockholders of the 20th of December, 1865, authorized the board of directors forthwith to cause the then president to deliver the deed of assignment in question, it passed the title of the property of the bank to the assignee. If the persons who executed the deed of assignment were not *de jure* officers of the bank for that purpose, they were at least *de facto* officers of the bank and the persons contemplated by the stockholders to make it: Angell & Ames on Corporations, §§ 283, 287. Besides, the stockholders, at a meeting held on the 20th of February, 1866, after the assignment had been made, ratified and confirmed the proceedings of the preceding meeting held on the 20th of December, 1865. In the case of the *Mechanics' Bank vs. Heard*, 37 Georgia Reports, this court held that service of a writ on Metcalf, as president of the Mechanics' Bank, on the 12th of September, 1865, was good service in a suit against the bank. If he

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was president of the bank for the purpose of perfecting service in a suit against the bank on the 12th of September, 1866, in contemplation of the law, surely he was quite as much president of the bank when he executed the deed of assignment on the 4th day of January, 1866.

2. Although the second charge of the court may have been error, and we think it was, as the 1494th section of the Code applies to such banks only as have made a voluntary surrender of their charters, or the use thereof, according to law, still, the first charge of the court was right, in view of the facts contained in the record, and should have controlled the case in favor of the claimant.

Let the judgment of the court below be affirmed.

JACKSON GRAHAM, plaintiff in error, *vs.* **ELVIRA W. CAMPBELL et al.**, defendants in error.

1. Where one of the subscribing witnesses to an unrecorded deed was dead, and the other stated that he did not recollect its contents, and the instrument was lost, parol evidence as to its terms was admissible.
2. Where a power of attorney authorized the agent thereby appointed to dispose of several tracts of land, and it was recorded with the conveyance of one tract, but subsequently lost, such record was admissible upon the trial of an issue as to the title to another tract conveyed thereunder, for the purpose of showing that such power had once been in existence.
3. Whilst the preliminary inquiry necessary to the introduction of secondary evidence is addressed to the discretion of the court, yet all the evidence admitted is for the consideration of the jury.
4. If an agent sign a note with his own name alone, and there is nothing on the face of the note to show that he was acting as agent, he will be personally liable on the note, and the principal will not be liable. If an agent make a note in his own name and add to his signature the word "agent" and there is nothing on the note to indicate who is the principal, the agent will be personally liable just as if the word agent were not added.
5. There is sufficient evidence to sustain the verdict.

Deeds. Evidence. Practice in the Superior Court. Principal and agent. Promissory notes. New trial. Before Judge KIDDOO. Jasper Superior Court. February Term, 1875.

orted in the decision.

J. BARTLETT; A. REESE; E. P. HOWELL, for plaintiff
or.

A. LOFTON; F. JORDAN, for defendants.

RNER, Chief Justice.

was a claim case, on the trial of which the jury, under
arge of the court, returned a verdict finding the prop-
ried on not subject. The plaintiff made a motion for a
ial on the several grounds therein set forth, which was
led by the court, and the plaintiff excepted.
ppears from the evidence in the record that on the 19th
ober, 1866, Graham, the plaintiff, sued out an attach-
against H. M. Gay, the defendant, who was a non-resi-
f the state, returnable to the semi-annual term of the
court of Jasper county, in 1867, which was levied on
ndred and fifty acres of land as the property of the de-
t, Gay, which was claimed by Campbell, as trustee for
fe and children. The plaintiff alleged in his declara-
ounded on the attachment, that the defendant, Gay, was
ed to him in the sum of \$1,069 70, besides interest, on
missory note signed by C. E. F. W. Campbell, agent of
ay, which Gay refuses to pay, a copy of which note was
ed to the plaintiff's declaration, and is in the following
and figures: "By the 25th day of December next, we,
er of us, promise to pay Bostwick & Graham, or bearer,
m of \$1,069 70 for value received; March 28th, 1861."
d by C. E. F. W. Campbell. Upon this declaration a
t and judgment was obtained against Gay to be levied
land attached as the property of Gay. The claimant
no party to that judgment attacked it on the ground
here was nothing on the face of the record of that judg-
which could have authorized the county court to have
red it against the property of Gay, the defendant in at-
tent, but on the contrary the record affirmatively shows

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that the judgment was rendered against the property of Gay on a contract made by Campbell; in other words, the record shows that the judgment was rendered against Gay's property to pay Campbell's debt. The claimant claimed the land under a deed made by him to himself, as trustee for his wife and children, under a power of attorney from H. M. Gay, the defendant, dated about the 2d of October, 1861. The deed and power of attorney were both lost, neither the deed nor power of attorney in connection therewith had been recorded, but the power of attorney in connection with the deed conveying another tract of land to a different party had been recorded, the record of which the court allowed to be read in evidence, over plaintiff's objections, from which it appeared that Gay had authorized Campbell, the claimant, to dispose of all his lands in the counties of Newton and Jasper. The court, after hearing evidence of the loss of the deed and of the death of one of the subscribing witnesses thereto, the other subscribing witness stating that he did not recollect the contents of the deed, and could not say whether it was read or not at the time he attested it as a witness, allowed parol evidence as to the contents of the deed by witnesses who had seen and read it.

1, 2. We find no error in admitting parol evidence of the contents of the lost deed under the facts of the case as disclosed in the record, nor in admitting in evidence the record of the power of attorney as a circumstance going to show that the original power of attorney alleged to have been lost had been in existence.

3. The preliminary inquiry as to the loss of the paper and the exercise of proper diligence to lay the foundation for the introduction of such evidence, is a question which is addressed to the sound discretion of the judge according to the peculiar circumstances of the case: 1 Greenleaf's Evidence, section 558. We think, however, that the court erred in its charge to the jury, "that the court having let in evidence the contents of a paper upon proof of its loss, they could not consider whether it had been properly executed, or whether its loss had been

proven, and that they could only consider what the proof of its contents was, and what it conveyed, to whom, and by whom." The admissibility of the evidence was a question for the court, but its weight and effect, when taken in connection with other facts in the case, was a question for the jury, and should be left to their consideration and judgment.

4. It would be extremely difficult for us to hold that the judgment rendered in the county court on the attachment and declaration founded thereon, against the property of Gay, on the note signed by Campbell, as the same appears on the face of the record, would bind his property as against the claimant, who was no party to that judgment, if the plaintiff, on the trial, had not gone behind it and put in issue the facts on which that judgment was based. The plaintiff's attorney in that case was introduced as a witness, who testified (without any objection having been made as to the competency of his evidence under the pleadings in the case,) that in 1860 or 1861, he had sent to him a debt of record from Texas against H. M. Gay, for the purposes of making the money out of Gay, who was here; that he sued out a bail writ and had Gay arrested; that he gave security and was released; that he had the debt perfectly secure; that Campbell, whose relations with witness were always very friendly, in the spring of 1861, came to him and told him that he was the agent of Gay, that Gay had left this land levied on, in his hands for the purpose of paying him this claim, and asked him to settle the bail case by taking his note as Gay's agent, and to release the security, and that it should be paid out of Gay's property which he had charge of. This was done, and as everything was done in haste and confusion on the eve of witness' departure for the war, by mistake he did not sign it as agent, and witness was surprised when he next saw the note in 1866, to find that he had not signed it as agent. It was given for Gay's debt, and not taken on Campbell individually. Witness treated him in signing the note as Gay's agent, and would not have agreed to release the bail writ security for the debt, for Campbell's individual debt, nor did he do so. Campbell testified that he

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gave his individual note to the plaintiff's attorney in settlement of the bail writ proceeding, and did not tell him that Gay had left all his business in his hands, and that he had control of this land to settle up this debt, and that he would pay it out of the land, and that he had left it with him for that purpose. The evidence being in conflict on this material and controlling point in the case, the jury were authorized to have found in favor of the claimant, that is to say, the jury were authorized to have found that the note on which the plaintiff's judgment was obtained against Gay, was not founded on a debt due by Gay, but on a debt due by Campbell in his individual capacity, therefore Gay's land was not subject to that judgment. The general rule of the law is, that if an agent sign a note with his own name alone, and there is nothing on the face of the note to show that he was acting as agent, he will be personally liable on the note, and the principal will not be liable. If an agent make a note in his own name and add to his signature the word "agent," and there is nothing on the note to indicate who is the principal, the agent will be personally liable just as if the word agent were not added: 1 Parsons on Notes and Bills, 92, 95, 102.

5. The uncontradicted evidence in the record is, that the money and property of the claimant's wife paid for the land, and that the claimant, by himself or agents, had been in possession of the land from 1861 until the time of trial. This is evidence of title on the part of the claimant, independent of any other, would have been sufficient to have enabled him to have attacked the plaintiff's judgment, or to have shown any other valid legal reason why the land should not be made subject to the payment thereof. The claimant was in the possession of the land as the trustee of his wife and children, and had been since 1861, with the purchase money paid therefor out of the money and property of his wife. The court, in its charge, submitted the question of fraud to the consideration of the jury, and they having passed upon it and found in favor of the claimant, and although the court may have committed some errors in the progress of the trial,

still, in view of all the facts disclosed in the record, we will not interfere with the exercise of the discretion of the court below in overruling the motion for a new trial.

Judgment affirmed.

THOMAS T. PAGE, administrator, plaintiff in error, *vs.* ALFRED I. HAINES, administrator, defendant in error.

An administrator is entitled to no relief in equity against a judgment at law, on the ground that he did not know the assets of the estate were deficient, or because he was ignorant of the effect of the judgment as evidence of assets, there being no sufficient excuse shown for his want of the requisite information.

Equity. Administrators and executors. Judgments. Before Judge HERSCHEL V. JOHNSON. Johnson Superior Court. September Term, 1875.

Reported in the opinion.

R. M. CARSWELL, by brief, for plaintiff in error.

CAIN & POLHILL; JOHN M. STUBBS, for defendant.

BLECKLEY, Judge.

Negligence in not making defense will prevent a court of equity from relieving against a judgment at law: Code, sections 3129, 3595. Judgment went at law against the complainant upon a debt of his intestate. Having been sued upon his bond as administrator, he now seeks, by his bill in equity, to avoid the effect of that judgment as evidence of assets. He alleges that he did not know that the assets were deficient; and that he was ignorant of the legal effect of the judgment as proof of assets. But had he been diligent in performing the duties of his trust he could have known the truth in respect to both of these matters, for aught that appears in his bill to the contrary. He renders no reason at all

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he did not take counsel as to the law, and no good reason he did not or could not learn the condition of the estate me to have pleaded to the action. The court below de- l the injunction prayed for and dismissed the bill. Judgment affirmed.

ARAH A. BALL, administratrix, *et al.*, plaintiffs in error, *vs.*
DAVID A. VASON, trustee, *et al.*, defendants in error.

1. When a bill is filed by a debtor as trustee for his children, to enjoin judgment creditors, some of whom have levied, and others are about to levy, upon his property, and a fund is brought into court for equitable distribution, counsel for the trustee, who filed the bill, are not entitled to fees to be paid out of the general fund raised. The interest to represent which such counsel were employed, is antagonistic to the general creditors whose judgments have been enjoined, and it would be inequitable to force such creditors to pay the counsel who fought and overthrew them.
2. Such fees are not included under the term "costs and expenses," which term was used by this court in directions on a former trial here, that "costs and expenses" should be paid out of a certain fund. In such a case as this equality is equity, and every party should pay his own counsel.
3. Expenses do include the necessary funds for carrying on the planting interest entrusted to the receiver, the employment of an overseer, the hire of laborers, the commissions of the receiver, and the expenses incident to the receiver's office and duties, and this court will not control the court below in fixing the amount of such expenses, unless his discretion has been greatly abused.
4. The receiver is a good witness to prove his account, and unless his vouchers are called for by the other side they need not be produced.
5. Where a lien for provisions, etc., to make a crop has been foreclosed and levied upon the crop made, and by reason of an injunction and appointment of a receiver, that crop has been exhausted and used by the receiver in making subsequent crops, equity will enforce such crop lien upon the subsequent rents, issues and profits of the plantation. Having seized the crop on which such creditor had levied and on which his legal grasp was laid, and taken it into the custody of the court's receiver, the court of equity will see to it that such creditor shall not suffer by its process and obedience to its behests.
6. Matters passed upon by an auditor or master will not be reopened and regularly excepted to in pursuance of the statute, but all parties will be concluded by the finding of such auditor or master unless there be subsequent discovery of some fraud or other equitable ground of relief.

Equity. Fees. Costs. Receiver. Witness. Debtor and creditor. Auditor. Judgments. Before Judge HANSELL. Dougherty Superior Court. April Term, 1875.

Reported in the opinion.

STROZER & SMITH; D. H. POPE; HINES & HOBBS; L. P. D. WARREN, for plaintiffs in error.

R. F. LYON, for defendants.

JACKSON, Judge.

A bill was filed by David A. Vason, as trustee for his children, to enjoin certain creditors from proceeding to make their money on judgments obtained by them against him, and to bring the property of Vason into court for distribution according to legal priorities. The case was brought to this court at a previous term, and sent back with instructions. The court below passed upon these instructions or directions of this court, and directed the funds raised from the sale of Vason's property to be paid according to his construction of those directions and the law arising thereon. Portions of the judgment of the circuit court were adverse to the interests of the plaintiffs in error in the above stated case, and these portions were excepted to by them, and are here for review in this cause.

Under the second head of its instructions this court directed that the costs and expenses be paid out of such fund as should remain after paying a trust debt of \$13,000 00, which trust debt was itself to be paid out of property in the hands of Vason at the time of its creation in the year 1855, and not otherwise. The property then in his hands did not realize enough to pay it, but paid some \$8,000 00 thereon. After paying it, and also a debt to Davis arising from a lien of his on certain lands, and which this court directed to be sold separately for his benefit, there remained \$5,390 38 subject to be paid as this court directed, and first to costs and expenses.

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Messrs. Lyon and Wright claimed that fees were due them for bringing these funds into court, and that these fees were to be paid out of this last named fund as part of expenses or costs. They proved that their services were worth ten per cent. upon the entire fund brought in—the trust, the Davis, and this balance fund—and the court allowed them \$1,700 00, to be paid out of this last fund of \$5,390 38 as part of costs and expenses. Exception is taken by Mr. Ball and other judgment creditors, to this ruling, and this is the first error assigned.

1, 2. The result or effect of this construction of the directions of this court is to make the comparatively small sum of \$5,390 38, left to pay several judgment creditors, bear the whole burden of bringing these funds into court. To state the proposition is to show its unreasonableness. It was said, however, by the counsel who argued for defendants in error here, that he did not claim that this fund should bear this charge alone, but only its *pro rata* share of it. But the court below makes this fund bear it all, and it strikes us as wholly insupportable on any view of law or justice or common sense. Doubtless the court below was misled by what he considered the directions of this court, for he is too clear-headed a judge ever to have made such an original ruling. But suppose we consider it in the modified and more moderate form in which counsel before us insists upon it, that the entire fund is to pay this fee, and this smaller fund only its *pro rata* share; how will it be then? Certain judgment creditors are pursuing the property of their debtor; they have levied and are about to levy upon it; the debtor, as trustee of his children, files a bill to arrest them in their efforts to make their money, and to set up a trust antagonistic to their interest. Money is finally brought into court; the trustee gets the larger share of it, but not content with that, claims that the judgment creditors shall pay his solicitors for getting it; that is, for taking the money away from them and securing it to the trust. Such a principle strikes us as wholly untenable; not quite so untenable, but

most as unreasonable as the ruling of the court below that the trust fund should pay no fee at all, but the general fund : creditors should pay it all. We are aware that there are cases where a vigilant, active creditor brings a fund into court and others come in to claim their part of the fund thus saved all by the vigilance and alertness of one, that *all* shall help pay all the expenses, including counsel fees of the vigilant, working creditor; and this rule is right. It is good sense and good law. But it is about as much like the case at bar as light is like day, or fire like water. Here, no property is acquired and brought in by the vigilance of anybody; but all the acknowledged and undisputed property is sold by agreement, put in a receiver's hands by agreement, and reduced to money without opposition; and equity here is equality. Let every man pay his own counsel. Messrs. Lyon and Wright were employed by the trustee; they have fought and won for the trustee; let the trust fund pay them. The words, costs and expenses, were never meant by this court to apply to fees. A fair construction will not make them mean fees, and the chief justice who sat on this case before, says that the court never dreamed of giving such a direction with such a meaning. We think, therefore, that the court erred in ordering these fees paid out of any fund except the trust, and in requiring anybody to contribute to it who did not employ these counsel, and in whose interests and for whose benefit they did not employ their unquestioned ability, zeal and energy.'

3. The court next ruled that Vason's services as receiver, and the amount he paid an overreer, should be paid as expenses and out of this fund of \$5,390 38, unless previously deducted. Such services are unquestionably, we think, part of the expenses necessarily incurred, and meant to be included in the second direction before referred to. It is therefore *res adjudicata*, decided by this court when the case was here before, and the court below following our directions could do nothing else than allow these services as expenses. We will not control his discretion in fixing their amount.

4. Some objections were also made to the receiver's report,

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but they rested upon his not producing the vouchers, and the court, in a note, says the vouchers were not demanded; so we do not interfere with that.

5. The next exception is to the payment of a lien of Tift for provisions, etc., so furnished to make the crop of 1871. The facts are that Tift foreclosed his lien on the crop of 1871, but was enjoined by this trustee's bill, and the crop which would have paid him went into and made that of the next year. The court directed it paid out of the rents, issues and profits of the ensuing years, and we think that the court carried out the spirit of the directions given on the former hearing of this bill, as well the equity of the case, in ordering this Tift claim to be so paid.

6. There was some objection that other funds that Vason paid Tift should have been applied to this claim, and an effort was made to prove it, but rejected by the court on the ground that it all transpired before the trial before the auditor, and was concluded by his report. We see no error in this ruling. We affirm the judgment of the court below on all the points made in this bill of exceptions, except as to the fees of counsel, and reverse him on that point, it being the judgment of this court that this is no case which requires all the creditors to pay the counsel who filed the bill under which the money was impounded, but that each party should pay his own counsel fees. And such, too, we think, is a fair construction of the directions given by this court, that counsel fees here are not included in the words costs and expenses.

Judgment reversed.

DAVID A. VASON, trustee, plaintiff in error, *vs.* SARAH A. BALL, administratrix, *et al.*, defendants in error.

1. The judgment of this court, with directions to sell certain property belonging to a debtor in 1855, and out of that property, *and not otherwise*, to pay a trust debt, will not be construed to embrace the rents, issues and profits of the lands so to be sold, nor the stock and cattle, nor the wagons, tools, etc.

thereon, none of which belonged to the debtor at that time, to-wit: in the year 1855.

2. Mortgages of lands in this state are mere securities for debt; they pass no title to the mortgagee; the mortgagor holds the title until sold out and dispossessed by foreclosure; hence the rents, issues and profits are the mortgagor's, and are not embraced or covered by the mortgage; nor is stock, or cattle, or the increase thereof, or plantation tools, subsequently bought, unless expressly stipulated for in the mortgage.

Equity. Judgments. Rents. Mortgage. Before Judge HANSELL. Dougherty Superior Court. April Term, 1875.

Reported in the opinion.

R. F. LYON, for plaintiff in error.

WARREN & HOBBS. D. H. POPE; STROZER & SMITH, for defendants.

JACKSON, Judge.

This case is a branch of that just decided, and was argued in connection with the other. In the other case, Mrs. Ball and other creditors excepted; in this case, Mr. Vason, the trustee, excepts.

When the case was before this court on the former trial, the court below was directed to pay \$13,000 00 as a trust fund for Judge Vason's children out of the property bound for the trust debt and covered by a certain mortgage. The order was to pay it from the proceeds of property belonging to Vason in 1855, and all his property was sold and the sales kept separate, so as to distinguish the several funds. The fund raised from the property of 1855 was not enough to pay the whole debt, \$13,000 00, and it was claimed that the rents, issues and profits of the lands so set apart, since the receiver worked them, were liable under the former judgment of this court to pay this trust. The court below ruled otherwise, and this is assigned as error.

1. The language of the direction of this court is that such trust debt shall be paid out of the proceeds of the sale of

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property, then, in 1855, belonging to Vason, *and not otherwise*. Well, these rents, issues and profits did not *then* belong to Vason, and they do not come under the terms of this direction.

2. It is urged, however, that the mortgage which covered the land covered also the rents and issues thereof, particularly after the receiver took possession and made the crops. In England and other states where the legal title vests in the mortgagee, and he can enter and use these rents and profits, it may be so; but we have always understood that, in our state, a mortgage was a mere security for a debt, and the mortgagee cannot enter or maintain ejectment. All he can do is to foreclose and sell and make his money out of the sale, and the rents and profits belong to the mortgagor until the sale, for the reason that the title remains in him until the sheriff sells him out and puts another in possession. Besides, we understand that by this marriage settlement, the rents, issues and profits were to be Vason's; he was not to be accountable therefor, and therefore this instrument was not designed to bind him, as trustee, to account to his wards for anything but the *corpus* of this estate. However this may be, we consider this question *res adjudicata*. It was settled in the directions this court gave that this trust debt was to be paid out of the sale of property Vason owned in 1855. These profits or rents were not owned by him at that time, and therefore cannot be applied to this trust now. It was also contended that the personal property on the plantation, wagons, tools, etc., etc., all put there recently, was also covered by this mortgage. We know of no rule of law that would so subject it. At all events, it was not in existence or owned by Judge Vason in 1855, and is not therefore embraced in the directions as property out of which this trust debt should be paid. It is also contended that the cattle and hogs, etc., are covered. We do not think so. Natural increase will not be covered by a mortgage that passes no title unless specifically named, particularly the cattle and hogs which came as increase during twenty years. At all events,

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they did not belong to Judge Vason in 1855, for they were not then in existence, and do not come within the terms of the judgment and directions of this court in this case: 53 *Georgia Reports*, 416. On the whole, we think the court right in deciding these several points against the plaintiff in error, and affirm his judgment.

Judgment affirmed.

B. W. HEARD, plaintiff in error, vs. MOSES R. JONES, defendant in error.

Where a judgment creditor of a bankrupt proves his debt in the bankrupt court for the purpose of obtaining his *pro rata* share of the assets there to be distributed, he waives any lien which he may have had the right to enforce by virtue of such judgment had he not entered the bankrupt court.

Bankrupt. Judgments. Lien. Before Judge GIBSON. McDuffie Superior Court. September Term, 1875.

Reported in the decision.

HOOK & WEBB, for plaintiff in error.

PAUL C. HUDSON, for defendant.

WARNER, Chief Justice.

This is a claim case arising from the following facts:

Heard is assignee of a *fi. fa.* in which Nolan is plaintiff, and Jones is claimant, having purchased land levied on from R. G. Griffin, defendant in *fi. fa.* On the 7th day of September, 1868, Nolan obtained judgment in Columbia superior court against said Griffin as principal, and F. S. Griffin and William Woodall securities, for \$1,187 37, and this judgment was duly assigned to Heard, January 10th, 1873. In the latter part of 1873 said R. G. Griffin was adjudicated a bankrupt, and the land levied on was duly declared part of his homestead exemption. February 17th, 1874, said Heard proved his judg-

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ment debt in bankruptcy, and in said proof neither reserved or released his lien. Having been informed that it was improvident for him to have proven said debt, Heard subsequently, on the 5th of January, 1875, sought to withdraw his execution which he supposed he had annexed to his proof, but leave was refused. He subsequently found that he had not attached the original, but it had been lost. He therefore established an *alias fi. fa.* which was levied on the land claimed. The claimant, Jones, purchased said land from said R. G. Griffin, by deed dated April 1st, 1874. On the trial, plaintiff in *fi. fa.*, (or Heard, as assignee,) put in evidence the *fi. fa.* and levy, proved assignment of same to him and title in defendant at the time of judgment and until April 1st, 1874, date of deed to claimant, and closed. Claimant then offered in evidence exemplification of record of probate of claim by Heard, of exemption of land levied on to R. G. Griffin by assignee in bankruptcy, of Heard's attempt to withdraw proof of claim and its failure; deed from register to assignee in bankruptcy, and of discharge of said Griffin.

It was admitted by counsel that Heard had received no dividend from R. G. Griffin, but the evidence in the record shows that he received from the assets of Woodall, one of the defendants in the judgment, the sum of \$494 10, which was awarded to said plaintiff's claim and paid over to him.

The court instructed the jury to return a verdict for claimant, which was done, and counsel for Heard excepted.

The only question made and insisted on here was whether Heard, by proving his judgment debt in the bankrupt court, thereby lost his judgment lien on the bankrupt's land which had been set apart to him as an exemption by the bankrupt court in the administration of the assets of the bankrupt's estate. The plaintiff's judgment was a debt due by the bankrupt. It was also a debt of record, which, by the statute law of this state, created a lien on the bankrupt's property. When Griffin was adjudicated a bankrupt it was optional with Heard, his judgment creditor, whether he would go into the bankrupt court and prove his debt in that court and

share in the distribution of the assets of the bankrupt's estate, or keep out of that court and rely on his judgment lien for the payment of his debt: *Jones vs. Lellyett & Smith*, 39 *Georgia Reports*, 64. It appears from the evidence in the record that the plaintiff, Heard, went into the bankrupt court and proved the amount of his debt as being due on a judgment, and afterwards, when it was ascertained that in the administration of the bankrupt's assets, after allowing him the exemptions to which he was entitled under the law, there would be nothing for him to get in payment of his debt so proved by him in the bankrupt court, out of the assets of the defendant, Griffin, although he did receive the sum of \$494 10 out of the assets of Woodall, the other defendant in the judgment, which was paid to his claim so proved by him in the bankrupt court, the said Woodall having been also adjudicated a bankrupt, though the debt does not appear to have been proved otherwise than as against Griffin, he petitioned the register to allow him to withdraw his claim from that court in which he had proved it. The register refused to allow him to withdraw it, and at the request of the plaintiff the register certified the facts to the district judge for his judgment thereon. The register, in his report of facts to the district judge, states that the plaintiff had proved his debt in the bankrupt court. The district judge approved the decision of the register in refusing to allow the plaintiff to withdraw his proven claim from that court. The record from the bankrupt court establishes the fact that the plaintiff did prove his debt against the bankrupt in that court, and that it was not withdrawn therefrom prior to the bankrupt's final discharge. It was, however, insisted on the argument here, that as the plaintiff had proved his debt as a debt due on a judgment, that it would not have been entitled to share in the distribution of the assets of the bankrupt's estate, because he did not release his lien created by the judgment to the assignee. A debt due on a judgment is not any the less a debt due by the bankrupt to the plaintiff because it is reduced to a judgment, and if the plaintiff chooses to prove that

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judgment debt in the bankrupt court for the purpose of obtaining his *pro rata* share of the bankrupt's estate, he will be at liberty to do so; but when he does that, he will be considered as having waived his lien created by that judgment on the other property of the bankrupt, for it would be unjust to the other creditors of the bankrupt for him to receive his *pro rata* share of the bankrupt's assets to be applied to that judgment debt, and then to be allowed to enforce his judgment lien against the property of the bankrupt in satisfaction thereof. The plaintiff had received all the money he could find in the bankrupt court due on his judgment debt by either Griffin or Woodall, including the \$494 10 arising from the sale of Woodall's property, and that was doubtless the reason why the bankrupt court refused to allow him to withdraw his claim. In view of the evidence disclosed in the record, we affirm the judgment of the court below.

Judgment affirmed.

MARY J. MARSH, plaintiff in error, vs. THE SOUTH CAROLINA RAILROAD COMPANY, defendant in error.

1. Improper acts by an agent touching matters out of the scope of his agency, are not to be imputed to the principal.
2. There is no presumption that a railroad corporation has authorized its local agent to hinder access by the counsel of an adverse suitor to a witness in the employment of the company; and, unless the delegation of such authority appears in evidence, the corporation will be unaffected by conduct of the agent tending to prevent such access.
3. What a mere spectator reported immediately after a homicide, as to the cause thereof, is not evidence as part of the *res gestæ*.
4. An employee of a railroad company who saw another employee killed by the cars, cannot affect the company by his declarations, made immediately after the occurrence, to the effect that the disaster was caused by the negligence of those in charge of the train, the speaker himself not being one of the number.
5. A witness cannot be asked on the stand by the party introducing him, whether he has not made a certain statement out of court, unless he has surprised the party by testifying to something inconsistent with the alleged statement.

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When a party, on the examination in chief, is permitted to put leading questions to his own witness, on the ground that the witness is in the employment and under the influence of the opposite party, the court may allow the latter to put leading questions on cross-examination.

To make a railroad company responsible for the homicide of an employee by the negligence of co-employees, it is essential that the deceased should have been free from fault himself; and when the evidence for the plaintiff shows clearly that he was not, there can be no recovery, and a judgment of non-suit should be affirmed.

Railroads. Principal and agent. Presumptions. Evidence. Witness. Practice in the Superior Court. Before Judge COMPKINS. Richmond Superior Court. April Term, 1875.

Reported in the opinion.

HOOK & WEBB, for plaintiff in error.

W. T. GOULD, for defendant.

BLECKLEY, Judge.

A wife sued a railroad company for the homicide of her husband, who was run over and killed by a train while he was engaged in uncoupling the cars. He was an employee of the company; and another employee, one Butler Addison, was present and witnessed the occurrence. Previous to the trial, the plaintiff's counsel had made some effort to obtain an interview with Addison for the purpose of learning the facts and ascertaining what he would testify, and had been prevented from so doing by the interposition of the company's local agent. Addison, it seems, had made a statement of the facts to the plaintiff immediately after the occurrence. He had also said to one Fullerton that the death was the result of the engineer's failure to put on brakes; that he, Addison, was afraid to tell it, lest he should be discharged; and that the agent would not allow him to communicate the facts of the case to the plaintiff's counsel until the trial.

Before Addison himself was introduced as a witness, his declarations made to the plaintiff and to Fullerton, were of-

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red in evidence; and, on objection by the defendant, the court excluded them.

The plaintiff then examined Addison and was permitted to put to him leading questions. A like privilege was accorded to defendant on cross-examination. Addison testified to nothing about brakes, and was asked no questions on that subject except whether he had not said to plaintiff, immediately after the killing, that her husband was killed in consequence of the brakes not being on. The court ruled against the answer as evidence.

1. The sayings of Addison were sought to be introduced partly on the ground that the agent had hindered intercourse with him by plaintiff's counsel previous to the trial. It is not clear to us how that would be any reason for admitting them, if it were conceded that the agent's conduct was improper, and that such conduct was within the scope of his authority. But improper conduct by an agent, not within his authority, certainly is not to be imputed to the principal, and is the principal to suffer a penalty on account of it.

2. There is no presumption that any mere local agent of a railroad is employed to stand between witnesses and their evidence, or that he is instructed to do so. To bring such an act within the sphere of delegated power, there must be proof of the delegation. There was no such proof in the present case, and consequently whatever the agent did in that way must be supposed to have been done on his own motion and not by procurement of the company.

3. Nor were Addison's declarations admissible as a part of the *res gestæ*. He was a mere spectator. His conduct was not to be illustrated, but the conduct of other persons. What he said immediately afterwards could give character to nothing that happened—could neither qualify nor explain it.

4. Nor, as an employee of the defendant could anything he may have said concerning the remissness of the other employees have bound the common principal. He was not an agent of the defendant for the purpose of making admissions by narrating a past occurrence, more especially, as he was not

ne of those upon whom he cast blame: See 34 *Georgia Reports*, 330.

5. The court was right in excluding the answer of Adlison as to what he had said out of court. He was not asked as to the fact of using brakes, but as to what he had said about it. Perhaps he would have said the same thing on the stand if he had been inquired of then. It was not a case of surprise. The plaintiff's counsel did not profess to be surprised by his having testified differently from the expectations which he had raised by his previous statements: Greenleaf's Ev., section 442.

6. The complaint that the defendant was allowed to put leading questions on cross-examination is not well founded in law. The examination of witnesses is very much under the control of the presiding judge. The general rule is, that all witnesses may be asked leading questions on cross-examination, and it may even be doubted whether an exception is ever made in practice: 7 Car. & P., 408. Certainly no such exception is usual: 1 Stark. Ev., 188.

7. Negligence, like any other fact, is a question for the jury: 4 *Georgia Reports*, 330. But we can see no practical utility in reversing the judgment of non-suit. The plaintiff cannot recover, for her husband was himself in fault, however negligent his co-employees may have been. Whatever created the danger it was as visible to him then as it can now possibly be made to a jury. He saw that the train did not stop for him to uncouple; and he, nevertheless, rushed in and tried to uncouple when the cars were in rapid motion: 53 *Georgia Reports*, 630. The evidence makes a case of contributory negligence; and any negligence whatever by the deceased employee bars recovery.

Judgment affirmed.

Reid *vs.* Tucker.

WILLIAM A. REID, plaintiff in error, *vs.* CLINTON C. TUCKER, ~~_____~~
defendant in error.

An attachment for purchase money, under section 3293 *et seq.* of the Code ~~_____~~
cannot be levied, by garnishment or otherwise, on property other than the ~~_____~~
described in the affidavit.

Attachment. Garnishment. Before Judge BARTLET ~~_____~~
Putnam Superior Court. September Term, 1875.

Reported in the decision.

WILLIAM A. REID, by brief, for plaintiff in error.

No appearance for defendant.

WARNER, Chief Justice.

On the 25th of January, 1875, the plaintiff sued out an *at-*
tachment, under the provisions of the 3293d section of the *Code*,
against the defendants, on a debt alleged to be due for *the*
purchase money of a certain described mule in the possession
of defendants, and also summoned W. A. Reid, as garnishee,
to answer what he was indebted to the defendants, or either
of them, or what property or effects of them, or either of them,
he had in his hands. Before answering, the garnishee moved
the court to dismiss the garnishment on the ground that there
was no authority to issue it in that proceeding. The court
overruled the motion to dismiss the garnishment. The gar-
nishee then answered that he was indebted to one of the de-
fendants \$80 00, and judgment was rendered against him for
that amount. The garnishee then made a motion for a new
trial on the ground that the court erred in overruling his
motion to dismiss the garnishment and in rendering judgment
against him as such garnishee, which motion the court over-
ruled, and the garnishee excepted.

The only question made here was whether an attachment
issued in behalf of a creditor, whose debt is created by the
purchase of property under the before recited section of the

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e, can be levied on any other property than that described in the plaintiff's affidavit by summons of garnishment or otherwise? In our judgment it cannot, inasmuch as the statute expressly declares that it shall *only* be levied on the property described in the affidavit. This being an extraordinary and summary remedy given by the statute for the collection of this particular class of debts, it should be strictly construed.

Let the judgment of the court below be reversed.

D. D. TWIGGS *et al.*, plaintiffs in error, *vs.* JOHN A. CHAMBERS, defendant in error.

In an action for property, the fee of plaintiff's attorney be payable, by special contract, out of the proceeds of the suit, the attorney has an immediate lien upon the property for his fee, as soon as the action is commenced; and the client has no right to defeat such lien by dismissing the action before trial, over the attorney's objection, without first paying the fee.

Attorney and client. Fees. Lien. Before Judge GIBBS. Richmond Superior Court. October Term, 1875.

In February, 1875, Caroline Z. Fogartie employed plaintiff in error, as her attorneys at law, to bring an action against John A. Chambers for the recovery of a certain valuable breeding stallion and racer known as "Hickory Jack," of which horse she held a bill of sale from the said Chambers. Mrs. Fogartie stated at the time she retained them that she was poor, and consequently unable to pay anything as fees unless a recovery was had. They examined into the case, and becoming satisfied of her right to recover, agreed and contracted with the said Mrs. Fogartie to bring the action, and to receive as compensation for their services a certain percentage, then and there agreed upon, of the sum recovered. On the 27th day of February, 1875, they, as attorneys of Mrs. Fogartie, brought an action of trover against John A. Chambers, alleging the value of the horse to be \$2,000 00,

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and his hire \$1,000 00, for the recovery of the horse and his hire.

A few weeks prior to the day the case was called, Mrs. Fogartie called upon her said counsel and exhibited great zeal and activity in the prosecution of her suit.

On Tuesday, the 19th of October, 1875, one week before the said case was called, Messrs. McLaws & Ganahl, attorneys of John A. Chambers, handed a communication to plaintiff in error, which communication was transmitted through the said Chambers, and which was in his custody and control, which the following is a copy :

“SAVANNAH, GEORGIA, October 18th, 1875.

“*Messrs. Picquet & Twiggs :*

“GENTLEMEN—You will please have the case relative to horse ‘Hickory Jack’ dismissed, and permit Mr. Chambers to have the horse, as I will not appear at court. You will please send me your bill of costs. Be as reasonable as possible, as I am sick and worried.

“Very respectfully, CAROLINE Z. FOGARTIE.

“Witness: ISAAC RUSSELL, J. P. C. C., Georgia.”

When the above letter was handed to them they declined to dismiss the case, and notified counsel for Chambers that they would prosecute the same for the collection of their fees.

When the case was called, counsel for Chambers moved to dismiss the same on the ground that the plaintiff, Mrs. Fogartie, had instructed her counsel by the said communication in writing above set forth, to dismiss said case, which communication was read to the court.

This motion was resisted by the plaintiffs in error on the ground that Mrs. Fogartie, their client, had no right to dismiss said case, so as to defeat the collection of their fees; and they insisted on their legal right to proceed with the case for the purpose of asserting and recovering their fees, and in support of this position they submitted to the court the contract entered into with Mrs. Fogartie, and the facts already set forth, which were not controverted by counsel for Chambers.

n error also stated in their places, as attorneys statement was not denied or controverted, that show by the testimony of Mrs. Fogartie that. l notice of the contract made by her with plain- and that he, by his superior influence over her l her to settle the case in defiance of the rights l, and without the payment of one cent by him

made to appear to the court that Mrs. Fogartie, her poverty, was unable to pay any fees to her unless the case was ordered to proceed the latter e whole of the same.

sustained the motion, and plaintiffs in error ex-

CUMMING, for plaintiffs in error.

ANAHL, for defendant.

; Judge.

suits for the recovery of real or personal prop- n all judgments or decrees for the recovery of rneys at law shall have a lien on the property re- : Code, section 1989. The lien *on the property* is til after recovery ; but there is a lien on the suit et at once, and the lien on the property is in- cially is this so when, as in the present case, ial contract for the payment of the attorney's fee xceeds of the suit.

nding some incompleteness in the expression, it to have been the purpose and intention of the give a lien upon the suit and the judgment, and a the property ; but if it were otherwise, an en- t the attorney shall be paid out of the proceeds a promise that the lien may be perfected on the can be done by a recovery. To employ an at- for property under such a contract, is in the na- 19.

 Reid vs. Jordan.

ture of a power with an interest, and such a power is irrevocable: Code, section 2183. The undertaking that the fee shall be paid out of the recovery is, again, in the nature of an equitable assignment of an interest in the recovery: 4 Cow 416; 15 Johns., 405. Here the recovery might have been directly in money. The action was for personal property and its hire. It was brought in the short form. In such a suit the plaintiff could elect to take a verdict for money: Code, sections 3390, 3564.

It seems from the record that the plaintiff sent written instructions to her attorneys to dismiss the action, and that they declined to do so, without payment of their fee. We think their objection was good, according to the showing they made as cause for the objection. As the matter was presented to the court, it was a question between the plaintiff and her attorneys alone. The defendant had no interest in it. It did not appear that the case had been settled, or that he had paid anything to have it dismissed. Besides, the plaintiff's attorneys alleged that they could establish the fact that the defendant had notice of their contract with the plaintiff: See Code of 1868, sections 1979, 1980; Code of 1873, section 1989; 36 *Georgia Reports*, 630; 39 *Ibid.*, 310. The contract for a fee to be paid out of the proceeds of the suit, was not champertous: *Moses vs. Bagley & Sewell*, 55 *Georgia Reports*, 283. The court erred in holding that the plaintiff had a right to dismiss the suit.

Judgment reversed.

WILLIAM S. REID, plaintiff in error, vs. DAVID JORDAN, defendant in error.

1. Where the return of service by an officer is not dated, the presumption is that service was perfected within the time prescribed by law.
2. A judgment rendered by a justice of the peace on the 19th day from the date of the summons, for an amount exceeding \$50 00, is void.

resumptions. Judgments. Justice courts. Before Judge TLETT. Putnam Superior Court. September Term, 1875.

reported in the decision.

7. F. JENKINS, for plaintiff in error.

JOHN W. HUDSON, by brief, for defendant.

VARNER, Chief Justice.

This case came before the court below on an appeal from a justice's court on an affidavit of illegality. On the trial of the case in the superior court, the court charged the jury that the affidavit of illegality, as set forth, was insufficient, and directed the jury to find a verdict overruling the same; in other words, the court sustained the demurrer to the defendant's affidavit of illegality as being insufficient in law to set aside the plaintiff's execution, whereupon the defendant excepted.

The grounds of illegality contained in the defendant's affidavit insisted on here, were: first, that he was not served ten days before the time of trial in the justice's court; second, that the summons in said case did not bear date twenty days before the time of trial in the justice's court.

1. As to the first ground taken in the affidavit of illegality, so much as the return of the constable of service of the summons on the defendant is not dated, the legal presumption is (in the absence of any proof to the contrary,) that the constable did his duty and served it within the time prescribed by law.

2. The main question in the case is, whether the justice had legal power or authority to render the judgment against the defendant on the day he did render it. The general rule applicable to the judgments of justices' courts (the same being a court of limited jurisdiction) is, that the justices have power and authority to render judgments, only when the constitution of the land authorizes them to do so; that power and authority must be exercised in the mode and manner that law

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prescribes: *Gay vs. McNeal*, 12 *Georgia Reports*, 424. All suits before justices of the peace must be commenced by summons, commanding the defendant to appear at the time and place of trial, which time and place shall be specified in said summons. All summonses, when the amount is over \$500 shall bear date twenty days before the time of trial: Code, sections 4139, 4141. The summons in this case was dated on the 1st of January, 1872, and the time of trial specified in the summons was on the 3d Saturday in January, 1872, and it is admitted in the record, by the agreement of the parties, that the 3d Saturday in January, 1872, was the 20th day of that month, so that counting the first day of the month and excluding the twentieth, as the 4th section of the Code provides, the judgment was rendered on the 19th day after the date of the summons, a day on which the justice had no legal power or authority to render the judgment under the statute, and that being so the judgment was void for want of authority of law to render it at the time it was rendered. If a justice can render a judgment against a defendant nineteen days after the date of the summons he can render a judgment within five days after the date of the summons, and one would be just as lawful as the other. In order to maintain and enforce the laws of the land we feel constrained to reverse the judgment of the court below in this case.

Judgment reversed.

JOHN F. ESTERLUND *et al.*, plaintiffs in error, vs. JAMES M. DYE, defendant in error.

- 1, The discretion of the chancellor in granting injunctions and appointing receivers, will not be controlled unless abused.
2. A chancellor has no authority, before the final hearing, to direct a receiver to sell a portion of the property in his hands and to pay to complainant an amount of money claimed to have been advanced by him to the defendant.

Injunction. Receiver. Before Judge GIBSON. Richmond County. At Chambers. December 24th, 1865.

Report unnecessary.

H. CLAY FOSTER, for plaintiffs in error.

JOSEPH GANAHL; WILLIAM R. McLAWS, for defendant.

WARNER, Chief Justice.

This was a bill filed by the complainant against the defendants praying for the rescission of a contract set forth there, and also praying for an injunction, and the appointment of receiver. A temporary order was granted until the hearing, and Sibley was appointed receiver to take charge of the property, and to hold the same until the further order of the court. On hearing the motion for the injunction, the chancellor, after considering the allegations made in the complainant's bill, and the answers of the defendants thereto, as well as the several affidavits filed in the case by the respective parties, granted the following order: "It is therefore ordered, in view of the insolvency of respondents, that they give good bond with sureties to be approved by the clerk of this court, for a reasonable rent for said lands, and the use of said property pending this litigation, and that the receiver do sell a sufficient portion of said crop now on hand, to pay to James M. Dye, the complainant, the sum of \$427 00, the amount claimed to have been advanced by him, unless defendants shall give bond therefor; and in the event of said failure to give said bond, that respondents be restrained from the use of the same, and that said receiver do proceed to occupy, hold and use the same, for the mutual benefit and advantage of complainant and respondents, with the privilege of either party, to move for his removal or change before me at any time." To the granting of which order, the defendants excepted.

There is nothing in this case to take it out of the general rulings of this court, that it will not interfere to control the discretion of the chancellor in granting the injunction on the statement of facts contained in the record, except that part of

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the order which directs the receiver to sell a sufficient portion of said crop now on hand, to pay James M. Dye, the complainant, \$427 00, the amount claimed to have been advanced by him. We are not aware of any law which would have authorized the chancellor to order the receiver to sell any portion of the property in controversy for the benefit of the complainant, until the final hearing of the case on its merits. We therefore direct that the order of the chancellor be modified to that extent only, upon the complainant giving bond and security for the protection of the defendants.

Let the judgment of court below be affirmed with directions as hereinbefore indicated.

JESSE A. ANSLEY & COMPANY, plaintiffs in error, vs. WILLIAM GLENDENNING, administrator, defendant in error.

1. When the only occasion for going into equity is, that the judgment sought to be enjoined is conclusive at law in another suit against the complainant, an amendment to the bill which alleges that the judgment is void for want of jurisdiction in the court that rendered it, is demurrable. Such an amendment is not in aid of the original bill, but inconsistent with, and destructive of it. A judgment void for want of jurisdiction need not be enjoined: *46 Georgia Reports, 396.*
2. When the object of a bill is to attack a judgment for something that transpired at the term when it was rendered, evidence of what took place at a subsequent term on the trial of an affidavit of illegality, is irrelevant.
3. A judgment against an administrator reviving a dormant judgment rendered against the intestate, is evidence of assets.

Equity. Judgments. Evidence. Administrators and executors. Before Judge BARTLETT. Richmond Superior Court. October Term, 1875.

Reported in the opinion.

FRANK H. MILLER, for plaintiffs in error.

H. CLAY FOSTER, for defendant.

BECKLEY, Judge.

The main facts of this case are reported in 52 *Georgia Reports*, 347. There was a judgment at law against an administrator reviving a previous judgment against the intestate, which had become dormant. Subsequently, when the administrator was sued on his bond, he filed a bill to prevent the effect of the judgment of revival as evidence of assets. The ground of that bill rested upon the fact that he had no assets, and was prevented from pleading *plene administravit* at the time when the judgment was rendered, by the ruling of the court that the judgment would not charge him with assets.

At the trial of the bill the complainant amended by adding an allegation to the effect that the judgment of revival was void, because rendered when the original judgment was dormant, the court, therefore, having no jurisdiction to enforce it. The amendment was demurred to, and the court sustained the demurrer. When it is remembered that the occasion for the bill was to resist the judgment of revival as conclusive of assets, it is plain that an amendment making it as void was suicidal. It cut the throat of the complainant's case. The defendants' counsel performed a silly office when he demurred it out of court separately, instead of demurring to the whole bill, as he might have done. 28 *Georgia Reports*, 339. An amendment, notwithstanding the right to present destructive matter, (28 *Georgia Reports*, *supra*,) ought to be in aid of the real equity of the actual case and not contradictory of it: 14 *Georgia Reports*, 17 *Ibid.*, 129; 16 *Ibid.*, 527. If the judgment was in fact void, there would be no need to enjoin it as evidence: 46 *Georgia Reports*, 396. And if it was not void, the new facts proposed as the basis of that attack upon it were immaterial, and for that reason the amendment was useless: 17 *Georgia Reports*, 420.

Evidence was admitted in behalf of the complainant, as what transpired on the trial of an issue of illegality. The effect of that evidence seems to have been to show that the

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Powell & Murphy vs. Weaver.

residing judge was of the same opinion when the illegality was tried, as he had been when the judgment of revival was rendered. But that was quite immaterial. The illegality did not go behind the judgment, and the court, on that trial, could rule nothing that would affect the judgment. The equity of the bill relates to what transpired at the term at which the judgment was rendered. Nothing that the judge said or did afterwards, can vary the rights of either party on the question of whether there is reason to modify the judgment or restrain its use as evidence of assets.

3. The charge of the judge, to the effect that the judgment of revival would not prove assets in the hands of the administrator, is contrary to the view which this court entertained when the case was here before: See 52 *Georgia Reports*, 347. It is that attribute of the judgment, and that alone, which lends significance to this proceeding in equity. What would be the sense or use of the complainant's bill if the judgment against him at law had no force as evidence of assets? We think the sole question for trial, (besides whether the administrator had assets,) is whether his counsel was prevented from pleading in due time by the ruling of the judge averred in the bill as taking place at the term at which the judgment was rendered.

Judgment reversed.

POWELL & MURPHY, plaintiffs in error, vs. A. M. & T. F. WEAVER, defendants in error.

The affidavit necessary to foreclose a crop lien given to factors, must state all the facts necessary to constitute a valid lien, and amongst them that it was created by special contract in writing.

Factors' lien. Pleadings. Before Judge HALL. Monroe Superior Court. August Term, 1875.

Reported in the decision.

ER & STEWART; TURNER & MURPHY; J. A. COTTEN;
LODDY, for plaintiffs in error.

IMOND & BERNER; W. D. STONE, for defendants.

NER, Chief Justice.

only question made in this case is whether the affida-
the plaintiffs to foreclose their crop lien against the
nt, was in compliance with the requirement of the

The court below held that it was not, and dismissed
ntiffs' levy; whereupon the plaintiffs excepted.

alleged in the affidavit of foreclosure that the defend-
s indebted to the plaintiffs the sum of \$98 00 for sup-
rnished to make a crop for the year 1874, and, to save
rom loss, gave them a lien, under section 1978 of the
f Georgia, upon her crops of cotton, corn, etc., raised

the year 1874, which said lien was dated the 1st day
uary, 1874. The point of objection was, that it was
ged in the affidavit that the lien was in *writing*. One
onditions prescribed by the 1978th section of the Code,
r to make a valid lien under that section, is, that it
e created by special contract *in writing*. The only
g required in this summary remedy to foreclose a crop
the affidavit of the plaintiff; consequently, that affi-
ould allege all the facts which it is necessary for the
F to prove at the trial, to constitute a valid lien under
ute, and if all the facts necessary to constitute a valid
e not alleged in the affidavit, it is a good ground of de-
thereto. Inasmuch as it is one of the conditions of a
rop lien that it should be created by a special contract
ing, that fact should be alleged in the plaintiff's affida-
l that not having been done in this case, the demurrer
was properly sustained by the court. It does not
rily follow from the allegation in the affidavit that the
ant gave the plaintiffs a lien under the 1978th section
Code upon her crops, etc., that the conditions prescribed

 Wilkinson vs. Bennett.

by that section had been complied with, so as to constitute a valid lien. The lien may have been taken under that section of the Code, and still not have been taken in accordance with the terms and conditions required by it.

Let the judgment of the court below be affirmed.

BENJAMIN M. WILKINSON, plaintiff in error, vs. JOSEPH A. BENNETT, ordinary, for use, defendant in error.

1. A tax collector who has collected money under orders of the ordinary levying county taxes, cannot urge the invalidity of such orders as an excuse for not paying over the money to the county.
2. It is no sufficient accounting for the money so collected, for the collector to show that he has paid the same into the county treasury in liquidation of a balance against him on the tax digest of a previous year.

Taxes. Before Judge McCUTCHEN. Dade Superior Court. September Term, 1875.

Reported in the opinion.

E. D. GRAHAM, for plaintiff in error.

W. N. JACKOWAY; J. A. W. JOHNSON; D. A. WALKER, by brief, for defendant.

BLECKLEY, Judge.

The tax collector of Dade for the years 1870, 1871 and 1872 failed to give bond and security, in either year, for the collection and payment over of the county taxes. In 1874 he executed a mortgage to the ordinary, for the use of the county, upon certain lands, reciting such failure and his failure to fully account, and providing for securing the county in the premises. The mortgage, according to its terms, was to be void in the event the said collector, when thereunto required according to law, should fully account of and concerning said taxes, and pay over to the county treasurer such sum or sums

money as should be found to be due on that account. To rule *nisi* brought to foreclose the mortgage, the collector set up, among other things, the invalidity of the several orders for the ordinary laying taxes for those years. He admitted on the trial that he in fact collected a certain amount of the taxes assessed for the years 1871 and 1872; and, for that amount, the court made the rule absolute, foreclosing the mortgage for that sum only. That judgment is complained of as error.

1. This proceeding is against the collector only. No sureties are involved. The collector used the orders to collect the money; he now seeks to attack them to retain it. He armed himself as a public agent with what was supposed to be good authority. The authority was not resisted by the tax-payers. They did not complain that the taxes were illegally assessed, but paid over the money for the public use. After this has been done, can the collector be heard to say that he must keep the money, because, perchance, the tax-payers may reclaim it? They have not reclaimed it, and possibly may never do so. They should, and the collector should be forced to refund. The proper legislation can doubtless be had for his relief. It is not to be presumed that the state will leave a faithful but unfortunate public officer to suffer by restoring the money legally taken from the citizen, and paid over to the county for public use. On the score of strict law, however, we think the collector cannot protect himself by alleging a title to this money outstanding in the tax-payers from whom it was received. The collector is an agent, and, as such, received the money. The public is his principal, for whom it was received. The Code declares in section 2188, that "an agent cannot dispute his principal's title except in such cases where legal proceedings, at the instance of others, have been commenced against him."

2. Nor can the showing made by the collector that he paid over this money to the county treasurer on the balance against him for the year 1870, avail him. That balance, so far as appears to us, was for legal taxes which he collected or ought to have collected. To use money arising from the taxes of 1871

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72, for any purpose but to pay it over on the digest
se years, was to convert it, and take the benefit of
lf. He collected it as the taxes of 1871 and 1872, and
m so account for it.
dgment affirmed.

JAMES M. SMITH, governor, for use, plaintiff in error, vs.
JAMES C. TAYLOR *et al.*, defendants in error.

1. An official bond, though not conditioned as the statute prescribes, will, under section 167 of the Code, be considered as if executed in conformity to the statute.
2. Though the bond of an ordinary be conditioned for the faithful discharge of all of his official duties, yet, in conformity with the statute, the condition will be held as being for the performance of his duties as clerk of the ordinary. Therefore such bond cannot be sued on for the failure to take security from a county tax collector.

Bonds. Officers. Ordinary. County matters. Before
Judge McCUTCHEN. Dade Superior Court. September Term,
1875.

Reported in the decision.

W. N. JACKOWAY ; J. A. W. JOHNSON ; D. A. WALKER
by brief, for plaintiff in error.

E. D. GRAHAM, for defendants.

WARNER, Chief Justice.

This was an action brought by plaintiff for the use
ordinary of Dade county, against the defendants on the
executed by Taylor, the former ordinary of said county,
his securities, conditioned that if the said Taylor should
and truly discharge all and singular the duties required
him in virtue of his said office of ordinary according to
and the trust reposed in him, then said obligation

e to remain in full force and virtue. The breach of the bond, as alleged in the plaintiff's declaration, is, that the defendant, Taylor, as ordinary, failed to perform his duty inasmuch as, that one Wilkinson was elected tax collector for the years 1870, 1871 and 1872, for said county of Dade, and failed to give any bond as required by law for securing the taxes due the county, and that the said Taylor, as ordinary, well knowing the fact that no such bond had been given by said Wilkinson, permitted him to proceed and collect the county taxes for the aforesaid years without appointing any other competent person to collect said county taxes, as he was required by law to have done, whereby the county lost the taxes due to it for the aforesaid years, amounting to more than 2,000 00. The defendants demurred to the plaintiff's declaration on the ground that it did not make such a case as would entitle the plaintiff to recover on the bond sued on. The court sustained the demurrer and dismissed the plaintiff's action; whereupon the plaintiff excepted.

The only bond which the ordinary is required to give under the statute law of this state is a bond in the sum of \$1,000, for the faithful discharge of his duty as *clerk of the ordinary*: Code, section 321. Although this bond now sued on is not according to its terms, in strict conformity with the statute, especially as to the condition thereof, still, under the provisions of the 167th section of the Code, it is not void for that reason, but should be held to stand in the place of just such a bond as the statute required the ordinary to give. The 167th section declares that "whenever any officer required by law to give an official bond acts under a bond which is not in the penalty, payable and conditioned, nor approved and filed as prescribed by law, such bond is not void but stands in the place of the official bond, subject, on its condition being broken, to all the remedies, including the several recoveries which the persons aggrieved might have maintained on the official bond." It follows, therefore, that inasmuch as the ordinary is only required to give a bond of \$1,000 00 for the faithful discharge of his duty as clerk of the ordinary, the

and now sued on should be held to stand in the place of such bond, and the defendant should be held liable thereon for any breach of duty by the ordinary as the clerk thereof, in the same manner as if that condition had been inserted in the bond, and not otherwise. If the plaintiff could be allowed to recover the full penalty of the bond on account of the alleged breach thereof as contained in his declaration, there would be no remedy left for the protection of those who may have been injured by the failure of the ordinary to discharge his duty as clerk thereof, the identical persons for whose protection the statute required the bond to be given. We find no error in sustaining the defendants' demurrer to the plaintiff's declaration.

Let the judgment of the court below be affirmed.

ELIZABETH MAHONE, plaintiff in error, vs. JAMES BRYANT,
defendant in error.

1. Where a written contract is described in the declaration as made with the plaintiff, it is too late, after verdict, to object that the contract produced in evidence was made with the plaintiff and others, jointly, there having been no plea in abatement for non-joinder of parties, and no objection, on the ground of variance or on any other ground, to the reception of the contract in evidence.
2. The jury are not obliged to stop precisely where the testimony becomes silent, but may go further, and from facts proven, (sometimes even from the absence of counter-evidence) may infer the existence of other facts. A verdict is compounded of evidence, law and logic.

Verdict. Waiver. Evidence. Before Judge JAMES JOHNSON. Talbot Superior Court. September Term, 1875.

Reported in the opinion.

PEABODY & BRANNON ; WILLIS & WILLIS, for plain
in error.

JAMES JOHNSON ; J. M. MATTHEWS, for defendant.

BLECKLEY, Judge.

The action was by a renter against his landlady. The contract was in writing. It stipulated, among other things, that the land was to be worked, the repairing done, and the crops saved, under the superintendence of Tilman H. Mahone. The rent reserved was one-fourth of the cotton and one-third of other crops made on the premises. Nine bales of cotton were gathered, ginned and packed. The tenant got two, and the other seven were taken and sold by the superintendent. This suit was to recover the tenant's share of these seven bales or of the proceeds of their sale. The plaintiff had a verdict for \$112 02, besides interest; and the defendant moved for a new trial, complaining that the verdict was contrary to law and to evidence.

1. It is insisted that the written contract, which the plaintiff produced in evidence, was not made with him alone, but with him jointly with two others, who, as well as the plaintiff and the defendant, executed and signed the writing. This is true, but we are inclined to think that, owing to the peculiar phraseology of the instrument, the plaintiff was the sole renter of the land, and entitled, severally, to all the produce, except the landlady's share reserved for rent. Taking the contract altogether, the intention seems to have been to treat the plaintiff as renter, and the other two as his helps or assistants in the cultivation, etc., their compensation being matter of arrangement between him and them. But whatever may be the proper construction of the contract in this respect, it was too late, after verdict, to make the question. There was no plea in abatement for non-joinder of the omitted parties, and the contract was admitted in evidence without objection. It should have been objected to on the ground of variance, if it were substantially different from the writing declared on, and if the defendant had wished to avail herself of that difference. She has suffered it to be sued on as a several contract and to come before the jury and remain before them as such. After verdict, she cannot be allowed to say that, al-

Mahone vs. Bryant.

though she contracted with the plaintiff, she did not contract with him only, and that his recovery is, for that reason, warranted.

2. Two short comings are said to be in the parol evidence namely, as to the value, or the amount realized for the seven bales of cotton, and as to the defendant's consent to the act of Tilman H. Mahone in taking possession and making the sale. Tilman H. Mahone, introduced by the defendant as a witness, testified that nine bales of cotton, averaging about five hundred pounds, were raised on the land; that plaintiff got two bales when cotton was worth eighteen cents per pound; that he, witness, took the other seven bales and sold them; that he paid plaintiff \$95 00 at one time, \$115 00 at another, \$25 00 at another, \$9 00 at another, and \$21 00, in cotton, at another; that he could not remember the different amounts he had paid the plaintiff out of said cotton money, but that he had paid to him the whole of it; meaning, doubtless, the whole plaintiff's share. From this evidence, more especially when taken in connection with that of the plaintiff, that he was offered for the seven bales eighteen cents per pound, we think the jury were authorized to infer that eighteen cents a pound was its value, and that, when sold, it brought that price. The person who sold it was on the stand as a witness, and said that was the value of cotton when the plaintiff got the two bales. If the seven bales had been worth less or had sold for less, would not this witness have so testified? On the other point, that of the defendant's consent, while there was no direct proof of it, there were circumstances before the jury from which, applying the logic of experience and common sense, they might have inferred it also. Tilman H. Mahone was mentioned in the written contract as the superintendent of the farm; the defendant, the owner of the farm, was a woman bearing his name, not improbably his wife or mother; she introduced him as a witness, and if he had not been her agent to take charge of the crop and sell it, nothing would have been more natural than for her counsel to have elicited from him that fact in his examination. Nothing to the contrary of such an agency ap-

in the evidence. He acted on the line of such an
 , for he paid over to the plaintiff a part of the proceeds
 cotton. The defendant sought to prove by him, and
 ve, so far as his testimony could establish it in opposi-
 that of the plaintiff, that payment was made in full.
 the pleas was payment, and the only payments attempt-
 be proven in support of this plea were those which
 made by him. In most cases the jury must not only
 he testimony, but reason upon it. They are not re-
 l to its letter, but may follow out its indications, and,
 ne fact infer another. Sometimes the absence of evi-
 to a negative may be a reason for trusting to even slight
 ions of the affirmative. The jury must, in civil cases, at
 e allowed due scope for the reasoning faculty. A ver-
 not the mere reflex of what truth there is in the testi-
 it is compounded of evidence, law and logic.

respect to payments made to the plaintiff, he gave an ac-
 of them differing in amount, considerably, from that
 by the defendant's witness. He undertook to specify
 tely every payment which he had received, and the jury
 tly believed him. It was their right to do so.
 gment affirmed.

ED R. GIBBONS *et al.*, plaintiffs in error, vs. ADDISON
 A. JONES *et al.*, executors, defendants in error.

the right of executors to recover from legatees depends upon a mis-
 in their returns upon the basis of which a settlement had been had,
 they seek to avoid such settlement on account of such mistake, the
 tes may also attack charges, etc., in the returns. The settlement is
 n binding on both parties or neither.

Administrators and executors. Settlement. Before Judge
 ERWOOD. Floyd Superior Court. July Term, 1875.

ported in the decision.

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Gibbons et al. vs. Jones et al.

C. ROWELL; DABNEY & FOUCHE, for plaintiffs in error,

ALEXANDER & WRIGHT, for defendants.

WARNER, Chief Justice.

This case came before the court below on an appeal from the court of ordinary of Floyd county. The jury, under the charge of the court, found a verdict in favor of the executors of Samuel Gibbons, deceased, against the legatees under his will, for the sum of \$395 00. A motion was made for a new trial on the several grounds therein set forth, which was overruled by the court, and the legatees excepted.

It appears from the evidence in the record that the executors and legatees had a final settlement in regard to the estate in their hands, on the basis of the returns of the executors to the court of ordinary then before them, and that on the 2d of June, 1873, the executors turned over to the legatees, (they all being of age,) all the remaining assets in their hands under the following written agreement:

“GEORGIA—FLOYD COUNTY.—Whereas, the executors of Samuel Gibbons, deceased, A. A. Jones and J. I. Wright, have turned over to us the balance of the property as enumerated in their second return made up to the 1st day of June, 1873, belonging to the estate of said deceased, after supplying to Mrs. L. U. Presley a plantation for which they paid to A. Griffeth \$8,000 00, \$2,000 00 remaining yet to be expended in permanent improvements, and also after having supplied to W. S. Gibbons a plantation for which they have paid to A. Griffeth \$9,500 00, \$500 00 remaining to be expended by them in permanent improvements: Now, therefore, in consideration of the facts above stated, we bind ourselves individually and for each other: First, that we will supply to our mother such sums of money as she may need from time to time out of the proceeds of the property turned over to us, and such as the executors are directed to allow her under the will. Second, that W. S. Gibbons will expend \$500 00 and

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W. L. U. Presley, \$2,000 00 in permanent improvements on their respective plantations.

“ Witness our hands and seals, June 2d, 1873.

“ L. U. PRESLEY, (Seal.)

“ W. S. GIBBONS, (Seal.)

“ A. R. GIBBONS, (Seal.)

“ J. H. PRESLEY, (Seal.)”

After the settlement had been made as before stated, and the property and assets turned over to the legatees, the executors discovered a mistake in their returns, in which they had omitted to credit themselves with \$400 00 as interest on advance payments made by them for the benefit of the estate. The legatees refused to have the returns corrected, and the executors then made a statement of the mistake in their return and filed it with the ordinary, and cited the legatees to appear before the court of ordinary and show cause why the return of the executors, including the \$400 00, should not be received as their final return. The legatees appeared and contested the \$400 00 item in the return, and also claimed the right to contest several other items in the return. The ordinary overruled all the objections of the legatees to the executors' return, and allowed the item for the mistake to be included therein to the amount of \$395 00, and rendered a judgment against the legatees, in favor of the executors, for that amount. On the appeal trial in the superior court, the court charged the jury, amongst other things, “that if, from the evidence, they believed the executors surrendered the assets in their hands in settlement, and the legatees accepted them with the full knowledge that the statement made by the executors, and which was then present, contained the charges for extra compensation, attorneys' fees, etc., now complained of, this amounts to a settlement, and the legatees are bound by it. If, from the testimony, you are satisfied that there was a mistake made, and the executors overpaid the legatees any sum, then they are entitled to recover the amount thus overpaid.” This charge of the court, in view of the evidence

 Napier vs. Trimmier.

contained in the record, was error. If the settlement was made on the basis of the executors' returns, as the same existed when it was made and the assets were turned over to the legatees, then the settlement was binding on all the parties to it. The legatees cannot be held to be bound by the settlement on the basis of the returns then present, and not the executors, the more especially as it was the fault and neglect of the latter if their returns were not complete. If the executors can go behind the settlement and open it for the purpose of correcting their own mistakes, then the legatees may go behind it and attack the returns of the executors, as they proposed to do. If the executors desire to hold the legatees bound by the settlement on the basis of their returns as the same existed at the time the settlement was made, then they can do so by dismissing their proceeding to have their returns corrected, but if the settlement is to be opened for that purpose, then it will be open for the legatees to contest their returns, or any part thereof, as they proposed to do. All the parties should be bound by the settlement on the basis of the returns as the same existed at the time the settlement was made, or none of them should be bound by it.

Let the judgment of the court below be reversed.



THOMAS C. NAPIER, plaintiff in error, vs. OBEDIAH W. TRIMMIER, administrator, defendant in error.

1. If, for a valuable consideration paid down, a party contracted to leave to another a money legacy by will, and died without performing the contract, some good legal reason should be shown by his representative why performance ceased to be obligatory—such as rescission, novation, release, etc.
2. Though newly discovered evidence be cumulative, and therefore not, of itself, cause for granting a new trial, yet it may be regarded somewhat as passing upon the whole case, another ground of the motion being that the verdict is contrary to evidence.

Contracts. Wills. New trial. Before Judge HALL. Co-
toosa Superior Court. February Adjourned Term, 1875.

ported in the opinion.

E. SHUMATE; J. A. W. JOHNSON; W. K. MOORE; W. AYNE, by brief, for plaintiff in error.

A. WALKER, by brief; A. T. HACKETT, for defendant.

BECKLEY, Judge.

A father, wanting to reclaim a dissipated son, induced in 1850, to convey to him his property, consisting of land and slaves. He promised to pay the son's debts, and that, engaged to bequeath to him by will a certain sum of money, in addition to an equal share with that of his children, in his estate. He made his will accordingly, paid a part or all of the debts in pursuance of his undertaking. Afterwards, he withdrew this will from the custody which he had placed it, and in 1860, made another, in which the only provision for this son was an equal share; and was not given directly to the son, but to a trustee for the benefit of him and his family. The father died in 1870, and the latter will was admitted to probate in 1871. It contained a clause revoking all former wills. In 1875 the son brought his action against the administrator with the will annexed, to recover the amount which the father had promised to give him in excess of an equal share. The administrator denied the general issue, want of assets, and the statute of limitations. He did not plead payment, performance, rescission or release. On the trial, the jury found in favor of the defendant; and the court refused a new trial.

The evidence *pro* and *con* need not be gone through for the purposes of this opinion. We have considered it all carefully, the effect of it, except in so far as it tends to show defendant's matters, is embodied in the foregoing statement. The conclusion at which we have arrived is, that the plaintiff established the contract substantially as alleged in the declaration, (showing only in amount,) and showed full performance of it in part, and partial performance on the part of his father.

 Burnett *vs.* Vandiver.

The breach in respect to the agreed legacy, (if the contract was in fact made, and if it still subsisted at the death of the old gentleman,) is apparent by reference to the will which was probated. Looking at all the evidence, it seems to us clear that the contract was made. Was it ever rescinded or modified? There is no direct evidence that it ever was, and circumstances warranting the inference that it was, have not been brought before us in the record. What may have been present to the jury which is not present to us we cannot know. We have no right to conjecture that they had the aid of facts which have not come hither for review.

2. Connecting both grounds of the motion for a new trial, we have no difficulty in saying that the motion should prevail. The newly discovered evidence may be cumulative, and therefore insufficient of itself, but some regard may be paid to it in passing on the whole case.

We are not to be understood as intimating what the verdict should be on a future trial, but only as declaring our conviction, based on the record, that another trial should take place.

Judgment reversed.

HENRY C. BURNETT, plaintiff in error, *vs.* J. J. VANDIVER,
defendant in error.

A bill in equity which alleges that the defendant became the purchaser of property belonging to complainant, sold at sheriff's sale, at a price far below its real value, under an agreement that he was to hold the same until reimbursed; that he has been repaid the amount advanced, but nevertheless is in possession of the property claiming it as his own, and praying relief, should not be dismissed on demurrer.

Equity. Contracts. Before Judge UNDERWOOD. *Floyd*
Superior Court. July Term, 1875.

Reported in the decision.

R. T. FOUCHE; FORSYTH & REESE, for plaintiff in error

LOWELL, for defendant. .

ERNER, Chief Justice.

There was a bill filed by the complainant against the defendant praying for a discovery, account and relief, etc. The defendant demurred to the complainant's bill for want of equity. The court sustained the demurrer and dismissed the bill hereupon the complainant excepted.

The grounds of the complainant's equity alleged in his bill, substantially, that he was the owner of a portable steam engine with all necessary apparatus for running the same, together with one planing and sash machine, rip-saw, etc., of the value of \$2,000 00; that said property was levied on to satisfy a judgment against complainant, amounting to the sum of \$116 00; that complainant was unable to raise the money to prevent the sale of said property, and applied to the defendant to pay said debt for him, when it was agreed between them that defendant should attend the sale of said property and bid off the same for complainant by bidding the amount of said debt therefor, and that complainant was to stand and run said engine and machinery, as agent for defendant until said debt was discharged or the defendant should reimburse the money advanced by him in bidding off the property; that the defendant attended the sale and bid off the property for the sum of \$116 00, and now claims it as his property, although the complainant has operated said engine and machinery under said agreement with defendant, and that it has turned out work nearly of the value of \$2,000 00, which is more than enough to discharge the amount the defendant bid for the property. In short, the defendant under the agreement made with the complainant, bid off the property worth \$2,000 00 for \$116 00, and the complainant has run it with the defendant until it has turned out work worth more than reimburse the defendant for the money he bid for the property under the agreement, and now the defendant claims to be the owner of the property under

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for it at the sale under the circumstances hereinbefore

In our judgment, in view of the allegations contained in the complainant's bill, the defendant should have required to answer them as prayed for, and that it was in dismissing it on demurrer.
that the judgment of the court below be reversed.

ARRIE M. DUPONT, plaintiff in error. *vs.* JAMES W. MAYO
et al., defendants in error.

(JACKSON, Judge, having been of counsel, did not preside in this case.)

1. The surety on a guardian's bond can obtain no discharge under section 1817 of the Code, without a petition, as required by section 4114, and having the ordinary to cite the guardian to appear and show cause against the application. The surety must sue in this manner for his discharge, and process must issue in terms of the law, that is, the guardian must be cited.
2. An order of discharge, based on no such proceeding, but simply accepting a new bond already executed by the guardian, with satisfactory security, in place of the old, and declaring a former surety discharged, is void.
3. Where the order of discharge does not recite that the surety has petitioned; or that the guardian has been cited, and these facts do not otherwise appear, but the order, on its face, rather indicates some informal proceeding by consent, there is no presumption that more was done than is set forth in the record.
4. Tax returns are required by law to be made by the guardian in the course of his duty, and are therefore evidence of assets to charge him and his sureties in an action against them upon the bond.
5. When the guardian is chargeable with more assets than the amount of the bond sued upon, the credits to which he is entitled should be applied to the excess till that is exhausted.

Guardian and ward. Bond. Presumption. Evidence. Before Judge KIDDOO. Dougherty Superior Court. October Term, 1875.

Reported in the opinion.

D. H. POPE; VASON & DAVIS, for plaintiff in error

ATLANTA, JANUARY TERM, 1876.

Dupont vs. Mayo et al.

R. F. LYON; WARREN & HOBBS; STROZER & SMITH
defendants.

BLECKLEY, Judge.

On the 9th of January, 1871, a guardian was appointed. On the 23d he was qualified and gave bond in the sum of \$6,000 00 with John C. Mathews and W. E. Smith as sureties. On the 13th of February thereafter, the ordinary passed an order declaring that this bond was not sufficient to cover the ward's property, and requiring an additional bond, with security, to be given in the sum of \$3,000 00. On the same day a further order was passed declaring that this requisition had been complied with, and that the security for the guardianship was then ample. The additional bond thus accepted, was for \$3,000 00, with W. J. Lawton, George W. Mayo and John C. Mathews, as sureties. It bore equal date with the prior bond, to-wit: January 23d, 1871. At March term, on the 13th of March, 1871, the ordinary passed an order in these terms: "It appearing to the court that James W. Mayo, guardian of Carrie Mayo, executed a bond, as such guardian, for the sum of \$6,000 00, with John C. Mathews and William E. Smith securities; and it being considered and ordered that said bond is insufficient in amount, and the unwillingness of said Smith to continue as such security, insufficient in security, and it further appearing that said James W. Mayo, guardian, as such, has executed two bonds since, one for \$6,000 00, with W. J. Lawton, George W. Mayo, and John C. Mathews, sureties, and another one for \$3,000 00, (the two bonds making, in the aggregate, \$9,000 00,) with said John C. Mathews and said George W. Mayo, as sureties, to take the place of and as a substitute of the first bond given by J. W. Mathews and Smith: It is therefore ordered that said William E. Smith be, and he is released and discharged from all liabilities thereon, on the substitute of said two bonds as aforesaid." The new bond for \$6,000 00, here referred to, was given on February 17th, 1871.

SUPREME COURT OF GEORGIA.

Dupont vs. Mayo et al.

ward having become of age and married, the present as brought by the ordinary for her use upon the second, that for \$3,000 00. It was commenced in August, and is against the guardian and the three sureties who executed that bond, Lawton, Mayo and Mathews. Lawton asked Smith's discharge from the first bond as a release of himself from all liability on the second. He proved at the trial that he became security, relying upon Smith's known solvency, and that the order for Smith's discharge was passed without his, Lawton's, consent or knowledge. If Smith were in fact discharged, regularly and properly, it might admit of some question whether Lawton's discharge would follow as a legal consequence. No rule on that subject need be settled in this case, for we hold that, on the record before us, Smith was not discharged.

1. The surety on a guardian's bond becomes bound by a contract in which the infant ward has an interest. That contract remains valid and binding until it is dissolved in the manner prescribed by law. A mode of dissolving it *pro tanto* is pointed out in section 1817 of the Code, read in connection with sections 4114 and 4115. The surety may make complaint to the ordinary, or for any reason show his desire to be relieved, and thereupon the ordinary shall cite the guardian to appear at a regular term of the court and show cause why the surety shall not be discharged; and upon hearing the parties and their evidence the ordinary may, at his discretion, pass an order discharging the surety from all future liability, and requiring the guardian to give new and sufficient security, or be discharged from his trust. The surety is to complain or show, for any reason, his desire to be relieved; that is, he is to make application for the order which he desires to be passed. Section 4114 declares that "every application to the ordinary for the granting of any order shall be by petition in writing, stating the grounds of such application and the order sought." The section then provides for notice of the application where it is necessary, and the following section directs "that the order of the ordinary

ways recite the names of the persons so notified, and the compliance with the provisions required." We think it is clear that the surety must *sue* for his discharge, and that the ordinary must therefore issue process; that is, cite the guardian to appear and show cause against the application. The proceeding is one between party and party; for the ordinary, after these steps are taken, is required to hear the *parties* and their evidence. The ward is not represented otherwise than by the guardian, and the guardian is *heard* by the ordinary—heard no less for the ward's benefit than for his own. The ward has no other hearing in the matter, and as the law provides for a hearing in a certain way, unless the hearing is had in that way, the ward is not heard at all. For a judgment which affects the ward to be valid, the guardian must be brought into court by legal means: *Harden*, (Ky.,) 103.

2. The order discharging Smith does not appear to have been based upon any proceeding whatever. No order is produced requiring the guardian to give new security, and it does not appear that such was ever passed. It is not shown that the surety petitioned or that the guardian was cited, or that any hearing was had. The law requires petition, process, trial and judgment. Not one of these is shown except the last, and that simply provides for substituting for the first bond a bond or bonds already executed, and declares that Smith shall be thereupon discharged from all liability, he being unwilling to continue as security.

3. The order of discharge is not without recitals, but what it does recite indicates rather a consent arrangement than any regular proceeding. If it were wholly without recitals, it would, perhaps, be better than it is; for, as it is so full, there is strong reason to think, either that it is exhaustive, or that the facts left out are not such as would bear recital and leave the order as compatible with law as it now appears to be. We do not hold that the order must recite all the preliminary proceedings. That seems to be the scheme of the Code; but in this case, we need not go that far—no further, indeed, than a majority of the court went in 47 *Georgia Reports*, 195. Let

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de that with respect to such an order as this the court
ary is a court of general jurisdiction, and that the ex-
provisions of the Code in section 4115 may be disre-
d by the ordinary whenever he thinks proper to do
Still, as some sort of a proceeding must have been con-
ed in the court of ordinary before the ordinary could
ally have passed the order, must there not be some
vidence that such a proceeding was at least commenced?
ould not that much be required to give effect to any judg-
ment of any court in a case between party and party. Sup-
pose this bond had been previously sued upon in the superior
court and a recovery had, and that recovery had been pleaded
in bar of the present action, would it have been sufficient to
produce the judgment merely, without the pleadings or some
other evidence of suit? Will the mere judgment of the su-
perior court, without more, support or defeat any action, when
the power to pass the judgment depends on the filing of a p-
tition, the issuing of process, perfecting service, etc.? W-
suppose not. Then, to require a surety who pleads his d-
charge by the court of ordinary, to prove his suit as well
the judgment, is to put the proceedings of that court on a
lower footing than we would those of the superior court. And
we cannot reasonably be expected to put them on a higher
footing. It seems to us enough to presume in favor of
court, that its proceedings duly commenced, were conducted
with regularity and supported by such evidence as the law re-
quired, without going farther and presuming, from a judgment
which does not recite any suit, that there was, in fact, such a
suit as there ought to have been. We are aware that when
the simple fact of a judgment is in question, the plead-
need not be shown: 1 Greenleaf on Ev., section 511; but
is otherwise where the party intends to avail himself of
judgment as an adjudication upon the subject matter:
So far from the face of the order raising a presumption
the prior proceedings ordained by statute were had, we
it is strongly suggestive that they were not had. To t
it is only necessary to read the order with some care.

4. The tax returns of 1871, made by the guardian, as such, showed money and solvent debts then in his hands amounting to \$4,500 00. This was proper evidence to charge him and his securities, a demand having, by other evidence, been shown upon him after the ward became of age and before this suit was brought.

5. The account in favor of the guardian, admitted to be correct, for \$1,543 98, would not absorb the principal and interest due from the guardian in excess of the \$3,000 00 bond. We can, therefore, see no reason why that account should go in reduction of the recovery on the bond. We do not think the verdict was contrary to law or to evidence, or that the court erred in any respect in favor of the plaintiff. It did not finally against the plaintiff by granting a new trial, and we reverse that judgment, and leave the verdict of the jury to stand.

Judgment reversed.

S. K. TAYLOR & COMPANY, plaintiffs in error, vs. STEPHEN CLARK *et al.*, defendants in error.

A trustee has no authority to create a lien upon the property of the trust estate, or the crops to be made thereon, for supplies furnished with which to make such crops.

Trusts. Lien. Before Judge CLARK. Sumter Superior Court. April Term, 1875.

Reported in the decision.

JOHN R. WORRILL, for plaintiffs in error.

C. F. CRISP; J. ANSLEY; GEORGE W. WOOTEN, for defendants.

WARNER, Chief Justice.

This was a claim case. The plaintiffs having foreclosed several crop liens which had been levied thereon, the same

Taylor & Company *vs.* Clark *et al.*

was claimed by different claimants. By consent of parties, the several cases were consolidated and tried together. The crop liens were created by the defendant as the trustee of Mrs. Darley, a married woman, under a marriage settlement deed executed in 1857. On the trial of the case, the claimants objected to the introduction of the crop lien *fi. fas.* in evidence on the ground that the trustee had no authority to create said liens, which objection the court sustained and dismissed the levies, whereupon the plaintiffs excepted.

It appears from the evidence in the record that the supplies furnished by the plaintiffs, for which the liens were created, were furnished for the benefit of the trust estate, so as to enable the *cestui que trusts* to make a crop thereon for the year 1874 and the question is, whether a trustee is authorized by law to create a lien upon the property of the trust estate, or the crop to be made thereon, for that purpose? The 2335th section of the Code declares that "trustees are not authorized to create any lien upon the trust estate except such as are given by law." We are not aware of any law in this state that gives to trustees the authority to create a *lien* upon the property of a trust estate. It was insisted on the argument that, under the 1978th section of the Code, that liens of the description mentioned in the record might be created upon such terms as may be agreed on by the parties would include trustees under the term "parties." The term "parties," as mentioned in that section of the Code, must be understood to mean such parties only as are *authorized by law* to make such agreements, and not such parties as are expressly *forbidden by law* to make them. If the supplies were furnished by the plaintiffs for the use and benefit of the trust estate, that estate is liable therefor, and their remedy to enforce the payment of their claims against the trust property is provided for by the 3377th to the 3382d sections of the Code, inclusive. Whilst it does not affirmatively appear from the record before us that any special injury would result to the trust estate by enforcing the collection of the crop liens created by the trustee on the property thereof, still we are not prepared to say that the statute which pro-

trustees from creating *any lien* upon the property of
 estate, except such as are given by law, is not a wise
 statutory statute. But, as a court, we can have nothing
 with the wisdom or expediency of the statute; our
 duty is to enforce it, and at some other time, and on
 other occasion, the efficacy and wisdom of its provisions
 doubtless be made manifest. We find no error in the
 of the court on the statement of facts disclosed in the
 l.
 the judgment of the court below be affirmed.

S. G. RENEW, plaintiff in error, *vs.* **ROBERT J. REDDING**
 assignee, defendant in error.

ere the affidavit upon which a distress warrant was based, alleged that
 defendant was indebted to the plaintiff \$1,232 50 for rent, and the evi-
 e was to the effect that the defendant contracted to pay a certain num-
 of bales of cotton, which was shown to be worth the sum aforesaid,
 was not such a variance as to require a non-suit.
 discretion of the court below in imposing the payment of costs on a
 seeking to amend his pleadings, will not be controlled unless abused.
 ere rent is contracted to be paid in cotton, a distress warrant lies there-

withstanding errors in the charge of the court, as the verdict did sub-
 stantial justice, a new trial will not be ordered.

ndlord and tenant. Pleadings. Evidence. Amend-
 . Costs. Practice in the Superior Court. New trial.
 re Judge CLARK. Schley Superior Court. October Ad-
 ved Term, 1874.

reported in the decision.

JOHN R. WORRILL; **W. A. HAWKINS**, for plaintiff in error.

ALLEN FORT; **HUDSON & WALL**, for defendant.

SUPREME COURT OF GEORGIA.

Renew vs. Redding.

WARNER, Chief Justice.

This was a distress warrant for rent sued out by the plaintiff against the defendant, in which the plaintiff alleged that the defendant was indebted to him the sum of \$1,232 50, besides interest, for rent, which was due and unpaid. The defendant filed his counter-affidavit under the statute, and the issue thus formed came on for trial, when the jury found a verdict in favor of the plaintiff for the sum of \$827 50. The defendant made a motion for a new trial on the several grounds therein set forth, which was overruled by the court, and the defendant excepted.

It appears from the evidence in the record that on the 12th of December, 1871, the parties entered into a written contract in which it was stipulated that they were to farm together the year 1872 on the plantation of the plaintiff, according to the terms and stipulations as therein set forth. It also appears from the evidence that in February or March, 1872, the parties made a new verbal contract, whereby the defendant agreed to pay the plaintiff fourteen and one-half bales of cotton for the rent of the land; that the fourteen and one-half bales of cotton, when the distress warrant was taken out in October, 1872, was worth the amount claimed in the distress warrant, which was \$1,232 50.

1. One of the errors complained of is, that the court refused to non-suit the plaintiff on motion of the plaintiff, on ground of variance between the evidence of the plaintiff and the allegations in the distress warrant. The defendant, in the distress warrant, is, that the defendant was indebted to the plaintiff in the sum of \$1,232 50, besides interest, for rent. The evidence was that under the new contract made in February or March, the defendant was indebted to the plaintiff fourteen and one-half bales of cotton for the same, which the same was worth the amount claimed for was \$1,232 50.

error in overruling the motion for a non-suit on the ground of variance.

Whether the court erred in sustaining the plaintiff's demurrer to the defendant's pleas of recoupment or not, we cannot determine, inasmuch as the pleas are not in the record for our inspection.

2. In relation to the error complained of in refusing to allow the defendant to put in a second amendment to his pleas unless he should pay the costs, the judge certifies that considerable delay had occurred during the trial by the defendant's filing a long amendment to his plea called a plea of recoupment, and during the further progress of the trial of the case, another amendment was proposed; the court required the payment of costs as to the second proposed amendment, but not as to the first amendment which had been allowed. This was properly a matter within the discretion of the court, according to the provisions of the 3482d section of the Code, and we will not control the exercise of it in this case, nor in any other, unless there has been a gross and flagrant abuse of that discretion.

3. Whether the plaintiff would have been entitled to his remedy by distress warrant or not, under the original written contract, he was clearly entitled to it under the new contract as proved by the evidence in the record, if the jury believed the plaintiff's evidence. It is true, the evidence was conflicting in relation to that point in the case, but that was a question for the jury.

4. The verdict is \$405 00 less than the plaintiff's demand; that is to say, the jury reduced the plaintiff's claim that much, though it is somewhat difficult to see upon what grounds, as the defendant's evidence fails to show what amount he was damaged by the plaintiff's failure to furnish cotton seed, or otherwise; but that is a matter about which the defendant has no cause of complaint. Although there may have been some errors in the charge of the court, still, we think that the verdict did substantial justice between the parties, at least the defendant has no just cause of complaint under the evidence

Bailey *et al.* vs. The State of Georgia.

in the record, and as the court below was satisfied with the verdict we will not interfere to disturb it.

Let the judgment of the court below be affirmed.

HENRY BAILEY *et al.*, plaintiffs in error, vs. THE STATE OF GEORGIA, defendant in error.

When six persons are indicted together for burglary, four as principals in the first, and two as principals in the second degree, and all the goods stolen on the occasion of the burglary have been found in the possession of two of the four, and the only witnesses who connect the other three (those on trial) with the offense, are the two principals in the second degree, who avow their own guilt, and who, though agreeing on all the proximate facts, contradict each other in respect to several remote circumstances, and two of the accused on trial prove an *alibi* by one witness, and the third, besides being shown to be a person of good character, establishes an *alibi* by four witnesses, a verdict of guilty is contrary to evidence, and a new trial should be granted.

Criminal law. Burglary. Accomplice. New trial. Before Judge UNDERWOOD. Floyd Superior Court. July Adjourned Term, 1875.

Reported in the opinion.

DABNEY & FOCHE, for plaintiffs in error.

C. F. CLEMENTS, solicitor general, for the state.

BLECKLEY, Judge.

Three of six defendants in the same indictment were tried for burglary. The witnesses to connect them with the offense were two of those not on trial, which two were charged as principals in the second degree. They testified positively to the participation of the others in the burglary; and while they were fully corroborated by other witnesses as to the fact that a burglary was committed, and as to some of the circumstances that attended it, there was no corroboration of their

only as to the fact that their three co-defendants then on were concerned in it. No circumstance, whatever, implicating these three, or any one of them, was otherwise proved. There was nothing else to cast the slightest suspicion upon

All the goods missed from the house by the owner found in the possession of that one of the defendants was neither upon trial nor a witness.

giving their evidence, the two accomplices avowed their presence, and admitted that they kept watch while the burglar broke the house, entered it, and brought out the goods. Each gave, substantially, the same account of the whole criminal transaction, but differed from each other in several particulars connected with other incidents and occurrences of the night whilst they were together.

Without going into the question discussed in *Childers vs. State*, 52 *Georgia Reports*, 106, touching the difference between corroboration generally and corroboration upon the particular fact on which the whole pressure of the case rests—question which divided the court as then constituted—we are of opinion that, in the present case, the inherent weakness of accomplice-testimony was made still more feeble by contradictions between the two witnesses as to minor matters, in which, if they had been truthful, they ought to have agreed. As a specimen of their divergence a single instance may be given, among several, which the record exhibits: After the burglary the witnesses proceeded on their travels to get a dog. One of them says they got the dog about midnight and brought it back; that when they started back with the dog they thought they would take a hunt, but the dog ran away from them, and they got lost and made up a fire, and staid in the place until about ten o'clock next day. The other says they did not get the dog until next morning, and did not start out that night nor go hunting. Agreement between the witnesses as to all the details of the burglary, and the want of such agreement as to the subsequent occurrences of the night, do seem to give room for thinking that these persons possessed inventive faculties and are not indisposed to exercise

Gunby vs. Thompson.

them. But the prisoners on trial defended by setting up an *alibi*. They proved themselves to have been at home, two of them by one witness, with some appearance of corroboration by another, and one of them by four witnesses. There was also evidence that this last was a man of good character. The trial took place within a week after the burglary, and on that account there was less than the usual danger of mistake by the witnesses as to time. Allowing for every uncertainty in that respect, we think the case made out by the state through the tainted evidence of avowed accomplices was met and overcome. The verdict was contrary to the evidence, and the judgment of the court refusing a new trial is, on that ground, reversed.

Judgment reversed.

ROBERT M. GUNBY, plaintiff in error, vs. GEORGE H. THOMPSON, defendant in error.

1. This court will not interfere with the discretion of the chancellor in granting injunctions and appointing receivers, unless some rule of law or well-established principle of equity has been violated.
2. When the vendee of property is insolvent and is receiving the rents and profits, the vendor having retained the title to secure the payment of the purchase money, a receiver will be appointed to take charge of the property, and to hold the proceeds thereof until final decree.

Injunction. Receiver. Before Judge JAMES JOHNSON.
Muscogee County. At Chambers. June 5th, 1875.

Thompson filed his bill against Gunby and Ellis & Harrison, making, in brief, the following case:

On August 1st, 1866, one George Hargraves agreed to convey to R. M. Gunby and D. L. Booker lot number sixty-two, in the city of Columbus, for \$15,000 00, one-fourth to be paid cash, the remainder in five years, with interest payable annually. When one-fourth of the purchase money should be paid and a mortgage on the property given to secure the bal-

Hargraves was to convey it to Gunby and Booker in simple. On October 1st, 1866, Gunby took possession of premises with the consent of Hargraves, but without performing his part of the contract, nor has he ever done so. Booker, in the meantime, released his interest to Gunby. On October 1st, 1872, Gunby made an agreement with Thompson, in which, after reciting the previous contracts between Hargraves, Booker and Gunby, and between Hargraves and Thompson, and payments made by Gunby, amounting to \$175 50, he promised to pay to Thompson, by the 1st of October, 1873, the balance due on the property, and receive the same; or in default of this to deliver possession to Thompson, and to relinquish all right thereto. Gunby failed either to pay the money or to deliver possession.

The lot were a dwelling house, out-houses, and a store-house. About October 1st, 1874, Gunby delivered possession of all the premises except the store-room, which he refused to release. He received rent for the lot during the years 1873 and 1874, only paying a part of it to Thompson. About October 1st, 1874, he rented the store-room to Ellis & Harrison. Finding them in possession, complainant requested them to pay the rents to him, which they refused to do on the ground that Gunby was their landlord. Gunby and Ellis & Harrison are insolvent, and complainant prays that Ellis & Harrison be enjoined from paying the rents to Gunby; that Gunby be compelled to perform the contract by releasing the store-house; and that, in the meantime, a receiver be appointed to take charge of the property and to collect the rents pending the litigation.

The answer of Gunby was, substantially, as follows:

He admits the contracts between Gunby, Booker and Hargraves; says the property was purchased for H. C. Mitchell Company, a firm composed of H. C. Mitchell, R. M. Gunby and R. B. Gunby; they expended a large amount of money improving it; they, and not Gunby alone, took possession, with the consent of Hargraves. Hargraves offered to make deduction of \$2,000 00 from the amount due if the time of

Gunby vs. Thompson.

payment was anticipated. They were about to raise the same through an insurance company, when Thompson procured a purchase from Hargraves and gave them time. To this they agreed, and the contract between Thompson and Gunby was made with that understanding. Thompson did not take possession on October 1st, 1873, nor were the premises let over to him, but indorsed notes for the rent, to be applied to the defendant's indebtedness.

The answer of Ellis & Harrison was, in brief, as follows: They rented the store from R. B. Gunby & Company, and assigned the notes to H. C. Mitchell & Company, and gave no cash for the payment of rent. They hold under this assignment and are ready to take up their notes upon presentation.

The case made by complainant's bill was supported by three affidavits.

Upon the hearing an injunction was granted and a receiver appointed as prayed for. To this judgment Gunby excepted.

R. J. MOSES; THORNTON & GRIMES, for plaintiff in error.

INGRAM & CRAWFORD; JAMES JOHNSON, for defendant.

WARNER, Chief Justice.

This is a bill filed by the complainant against the defendants, praying for a specific performance of a written contract for the possession of a certain described store-house in the city of Columbus, and also praying for an injunction and the appointment of a receiver pending the litigation, on the ground that the defendants are insolvent and unable to pay the damages for the rents and profits of said store-house, worth \$50 00 per month. Upon the hearing of the bill for the injunction and the appointment of a receiver as prayed for, the chancellor, after considering the allegations of the complainant's bill, the answers of the defendants, the affidavits read at the hearing, granted the injunction, appointed a receiver to take possession of the property, let out the same, and collect the rents, subject to the order of the court, whereupon the defendants excepted.

There is nothing in this case to take it out of the general rulings of this court that it will not interfere to control the discretion of the chancellor in granting injunctions and appointing receivers unless some rule of law or well established principle of equity has been violated. This case comes within the principle recognized and decided during the present term, in the case of *Tufts vs. Little*, not yet reported.

Let the judgment of the court below be affirmed.

DENMAN & BICE, plaintiffs in error, vs. THE CHEROKEE IRON COMPANY, defendant in error.

A contract for the production of charcoal being that the producers were to deliver a definite quantity of good merchantable coal each day for a period of seven months, and that the consumer was to receive it at the pits, "in the Lasket," and haul it to the furnace, where it was to be measured and credited to the producers, at six cents per bushel, on their account for cash advances, it was the right of the producers to draw the coal from the pits at the rate requisite to make the stipulated delivery daily; and if the consumer failed to receive and haul at the like rate, any depreciation in quality or diminution in quantity occurring by exposure to weather, would be at his risk. It follows, that so long as the cash advanced to the producers was largely in excess of the value, at contract price, of all the coal drawn from the pits, the producers would have no reason to abandon or rescind the contract, or to sue for a breach in not hauling the coal away—more especially, if the consumer had never signified any positive determination not to bear the loss occasioned by destruction or depreciation from weather.

Contracts. Before Judge BUCHANAN. Polk Superior Court. August Term, 1875.

Reported in the opinion.

WOFFORD & MILNER; BLANCE & KING, for plaintiffs in error.

WARREN AKIN, for defendant.

BLECKLEY, Judge.

The plaintiffs sued the defendants, alleging the breach of a written contract. The defendant denied the breach, and pleaded, both as recoupment and set-off, over-payments made to the plaintiffs in performing the contract. The trial resulted in a verdict against the plaintiffs for over \$500 00. They made a motion for a new trial, and it was refused.

The subject of the contract was charcoal, which the plaintiffs were to burn, and the defendant was to receive. The defendant undertook to furnish money to pay for chopping the wood; to furnish the requisite supply of water; to furnish quarters at the colliery for all the laborers; and "to pay for all coal delivered at the furnace bank, at the rate of six cents per bushel, the same to be measured at the furnace bank." The plaintiffs, on their part, undertook to make for the defendant a good merchantable article of coal, not using more than three cords of wood to one hundred bushels; also, "in the delivery of the coal, not to send over one-tenth in brand, the brands not to exceed eighteen inches;" and "to deliver eighteen hundred bushels coal per day, from the 1st June to the 1st January, provided the wood can be cut, each bushel to contain twenty-seven hundred inches." It was stipulated that the plaintiffs were "to be charged with all money advanced for the benefit of the colliery; and the coal to be credited to their account, at the rate of six cent per bushel when they send it in; the coal to be received in the basket at the hearth."

By the "hearth," as explained by the evidence, was near the hearth of the pits; the furnace bank, where the coal to be measured, was at defendant's iron works. It was proved that the hauling was to be done by defendant, but whether to be done, did not appear, further than can be collected from the terms above quoted from the within contract. The questions made before us, in the argument, were, how is the contract, in so far as it bears upon that point to be construed, and what consequences flow from such construction.

plaintiffs contend that the defendant was bound to draw as fast as the coal was drawn from the pits, up to eight hundred bushels per day, the quantity which they stipulated to deliver. They say they were forced to abandon the contract and thereby sustained damage, because the defendant would not haul at that rate, when pits were ready for the business of drawing.

Evidence was submitted, on the trial, to the effect that about seven hundred bushels were destroyed by reason of not being hauled in time; that when coal stands a week after it is ready for drawing, each kiln will lose one hundred bushels per day; that if drawn and exposed to the weather, it will remain marketable only a few days, will commence to lose after four or five days, lose constantly, and become worthless; and that when the plaintiffs withdrew from the work, they had several kilns burning and several ready to draw.

The contract, taken all together, contemplates continuous operation between the parties in executing its terms. Inasmuch as the coal was to be measured at the furnace bank, the defendant was bound not to suffer any delay in transportation thither that would be necessarily injurious to the plaintiffs. But it is clear that so long as the plaintiffs were overpaid by cash advances which the defendant had made to them, the coal which they had drawn from the pits and made ready for "the basket," they were not injured. As the coal was to be received at the hearth, in the basket, and so measured each day, the loss to it by weather, after preparation for use in the basket, at that rate, would be the defendant's loss. The plaintiffs had a right to proceed upon that theory, and ought to have proceeded. The stipulation for measurement at the furnace banks, rather than at the hearth, was most probably for the defendant's benefit. It was not material to the plaintiffs that it was measured. The basket, as the evidence shows, contained about two bushels. It might have been used to measure the quantity of each day's supply, as though the defendant had been sent there to receive it. If any special expense had been incurred on account of this mode of measurement, the same would have

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men chargeable to defendant, but it does not appear that such could have been the case. There was no question of room or storage, as the pits were in the woods.

When the plaintiffs abandoned the work they had quite a considerable sum of money which the defendant had advanced them in excess of all the coal they had drawn. It was enough to pay for all the coal left in the pits and for some wood and other property left, the benefit of which the defendant got taking possession. Over and above all these items, there was a balance of between \$500 00 and \$600 00, for which the verdict in the present case was rendered. The only possible doubt as to the verdict, is whether it should not be reduced to the extent of the value of the coal lost by reason of delay to haul; that is twenty-eight hundred bushels at six cents per bushel, \$168 00. It does not appear clearly from the evidence whether that loss occurred on coal drawn or undrawn. We rather think the latter is true, and therefore, that it was properly disallowed by the jury.

Judgment affirmed.

THE BRUNSWICK AND ALBANY RAILROAD COMPANY, plaintiff in error, vs. A. D. GALE, defendant in error.

A railroad company is bound to exercise extraordinary diligence for the protection of passengers; but this done, it is not liable for injuries sustained.

Railroads. Diligence. Before Judge HALL. Worth Superior Court. October Term, 1875.

Reported in the decision.

WARREN & HOBBS, for plaintiff in error.

D. H. POPE, for defendant.

1, Chief Justice.

ntiff brought his action against the defendant to nages for alleged injuries sustained by him as a on its railroad, caused by the alleged careless and onduct of the defendant's agents. On the trial of e jury, under the charge of the court, found a ver- or of the plaintiff for \$2,000 00. The defendant ion for a new trial on the several grounds therein hich was overruled by the court, and the defend- d.

rs from the evidence in the record that the in- ined of was caused by the car of the defendant n off its railroad track, in which the plaintiff nger; that the train was on schedule time when t occurred, and was running about fifteen miles wn grade; that it was in the night, and in turn- curve in the road, the train ran over a large bull k and was thrown off; that the head-light, owing e in the road, did not enable the engineer to see the track in time to stop the train so as to prevent t; that as soon as the engineer saw the bull on the t on brakes and endeavored to stop the train, but to do so. The plaintiff did not hear the whistle t on brakes, though at the time he was in the pas- engaged in a lively conversation with other per- e and the plaintiff testified that a short time before ey were at Valdosta, on the track of the Atlantic Railroad, at night, and looked to see how far an l be seen on the track in front of the head-light of and could see for two or three hundred yards very he defendant, as a carrier of passengers, was bound ercised extraordinary diligence in behalf of itself nts for the protection of the lives and persons of its but was not liable for the injury done to the plain- ving used such diligence: Code, section 2067. When ff proved that he was injured as a passenger on the

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defendant's road, the presumption of the law was against the defendant that he had been so injured by its negligence, or that of its agents, and it was incumbent on the defendant to rebut that legal presumption by evidence that it exercised extraordinary diligence to prevent the accident which caused the injury to the plaintiff; that is to say, that it exercised that extreme care and caution which prudent and thoughtful persons use in securing and preserving their own property. These principles of law the court gave in charge to the jury, and the question is, whether the verdict, under the evidence, was not contrary to the charge of the court and therefore contrary to law. Assuming that the court charged the jury correctly as to the law, what is there in the evidence contained in the record, which impeaches or contradicts the testimony of the four witnesses who state that the accident was unavoidable, and could not have been prevented by the exercise of extraordinary diligence on the part of the defendant, under the circumstances connected with the injury, of which the plaintiff complains. If the four witnesses who testified for the defendant swore the truth (and their testimony is not impeached or contradicted,) then the accident was unavoidable, and rebutted the legal presumption of any negligence on the part of the defendant, either slight or otherwise, and therefore the defendant was not liable, under the law, to the plaintiff for the injury complained of. The evidence of the four unimpeached and uncontradicted witnesses for the defendant is, that owing to the curve in the road, the engineer could not have seen the bull on the track of the road in time to have stopped the train, so as to have avoided the accident. The statement of the plaintiff that the engineer said that he thought the engine would have knocked the bull off the track, does not disprove the truth of the statement that the accident was unavoidable. Nor does the statement of Pope and the plaintiff, as to their observations at Valdosta, on the Atlantic and Gulf road, affect the question to the liability of the defendant at the time of the accident complained of on its road, even if that testimony was legal

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missible, had it been objected to at the trial. If the accident which caused the injury to the plaintiff, could not have been prevented by the exercise of extraordinary diligence on the part of the defendant, then it is not liable therefor under the law, and inasmuch as four unimpeached and uncontradicted witnesses swear that the accident was unavoidable, and their testimony being corroborated by the facts and circumstances connected with the transaction, the verdict was contrary to law, the legal presumption of negligence on the part of the defendant having been rebutted by unimpeached and uncontradicted evidence as disclosed in the record. Besides, there is evidence of witnesses who were present at the time the accident occurred, who state that the plaintiff did not then appear to be hurt much, and one witness states that he then said that those in charge of the train had acted nobly.

Let the judgment of the court below be reversed.

ELIJAH E. JONES, plaintiff in error, vs. CHARLES G. JANES, administrator, defendant in error.

On land conveyed in 1870, the vendor, or one holding the notes given for the purchase money, has no lien for payment; nor, after death of the vendee, has such creditor any priority of payment, out of the land or its proceeds, over other creditors by promissory notes, etc.

Vendor and purchaser. Lien. Distribution. Before Judge UNDERWOOD. Polk County. At Chambers. December 24th, 1875.

Reported in the opinion.

WOFFORD & MILNER, for plaintiff in error.

L. G. JANES, by brief, for defendant.

BLECKLEY, Judge.

This bill was by the bearer of certain notes given for the purchase money of land, in 1870, against the administrator of the vendee. The injunction prayed for and refused, was

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to restrain the administrator from selling the land for the purpose of paying debts generally, and until a judgment could be obtained against him in a pending suit on the notes. The bill asserts a lien upon the land, and denies the right of other creditors to share in it as a fund for the payment of debts, until the purchase money is all discharged.

It is not pretended that the land was not conveyed to the vendee by absolute deed. The vendor's lien was abolished by the Code, and this transaction was long after the Code was adopted. If, therefore, this bill were by the vendor, or if the bearer of the notes be admitted to have all the vendor's rights, no lien could be recognized as existing by implication of law. And none is alleged as existing through express contract, by mortgage or otherwise.

The bill fails to disclose any legal or equitable right to priority in the distribution of any of the assets of the intestate's estate. This debt takes rank, not by its consideration, but simply by the form in which the intestate left it—that of promissory notes: Code, sections 1997, 2533.

Judgment affirmed.

JOHN M. JOHNSON *et al.*, plaintiffs in error, vs. WYCHE S. JACKSON, administrator, *et al.*, defendants in error.

[JACKSON, Judge, being related to the parties plaintiff in error, did not preside.]

1. If foreign executors or administrators come within the jurisdictional limits of this state they are liable to be sued here by creditors, or to be brought to an account by legatees or distributees.
2. The assets of the deceased should be applied to the payment of debts, or be distributed amongst the next of kin, by the courts of this state, according to the law of the state where such representatives were appointed. This is the comity of states as recognized by the 9th section of the Code. By WARNER, Chief Justice.
3. If an administrator, appointed in Alabama, together with the securities on his bond, become residents of this state, they are liable to be sued here on a decree rendered in this state on a bill filed by the distributees for an account and settlement. By the court.

Administrators and executors. Jurisdiction. Bonds. Venue. City. Before Judge BUCHANAN. Troup Superior Court. November Term, 1875.

Reported in the decision.

H. BIGHAM; JACKSON & LUMPKIN, for plaintiffs in error.

M. LONGLEY, for defendants.

VARNER, Chief Justice.

This was an action brought by the plaintiffs as the heirs and distributees of H. T. Erwin, deceased, against Wyche S. Jackson, administrator of said Erwin, and his securities on administration bond, in the county of Troup, all the defendants being alleged to be of said county, except Jones, who was alleged to be of the county of Baker in this state. The plaintiffs allege in their declaration that Jackson was appointed administrator on Erwin's estate by the probate court of Chambers county, in the state of Alabama, in the year 1859, and then and there the defendants executed the bond sued on, conditioned for the faithful performance of his duty as such administrator. The plaintiffs also allege that as such administrator he possessed himself of the estate of said Erwin of the value of \$75,000 00, and has wasted and appropriated the same to his own use. The plaintiffs also allege that they brought suit in the superior court of Troup county against said Jackson, as administrator aforesaid, for an account and settlement, and obtained a decree against him for the sum of 1,596 95, besides interest and costs, in that court; that no part of said decree has been paid; that a *fiery facias* has been issued thereon, and a return of *nulla bona* has been made thereon by the sheriff of Troup county; all of which the plaintiffs allege as a breach of his bond, and now seek to recover the amount of said decree from the defendant and his securities on his aforesaid administration bond. The defend-

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ants demurred to the plaintiff's declaration, and made a motion to dismiss the plaintiffs' action on the ground that the superior court of Troup county had no jurisdiction of the case, which demurrer and motion the court sustained, and the plaintiffs excepted.

There was no point made that the defendants had not been regularly served with process as required by the laws of the state.

1. The question made and insisted on here was, that the court had no jurisdiction of the case because the administrator had been appointed by the probate court of the state of Alabama, and that the bond sued on had been taken by that court in that state, and must be sued on there, and could not be sued on in the courts of this state, although the defendants might be personally liable to be sued here. Whatever may have been the decisions of the other courts in relation to the question of jurisdiction in this class of cases, (and it is conceded they are conflicting,) still, if it was an original question in this court, I should hold that it was controlled by the constitution and laws of this state, so far as our own courts are concerned. By the constitution, the superior courts of this state have jurisdiction of all civil cases, except as therein otherwise provided. The sovereignty and jurisdiction of the state, and the laws thereof, extend to all persons while within its limits, whether as citizens, denizens or temporary sojourners: Code, section 21. A citizen of another state passing through this state may be sued in any county thereof in which he may happen to be at the time when sued: Code, section 3416. The provisions of the law are general and include executors and administrators as well as all other persons; there is no exception made in favor of executors and administrators, or securities on their bonds. If they come within the jurisdictional limits of the state, they may be sued in any county in the state in which they may happen to be at the time when sued. The policy of the state is to furnish her own people with a remedy to recover their rights in her own courts, without compelling them to go into a foreign jurisdiction to ob-

1. their lawful and just claims. These principles were fully recognized by this court in *Maxwell vs. Seymour, Fannin & Company*, 30 *Georgia Reports*, 440, in which it was held that persons within the limits of a government, whether their residence be deemed permanent or temporary, are to be deemed *par* citizens or subjects thereof, as that the right of jurisdiction, civil and criminal, will attach to such persons.

2. When a foreign executor or administrator is sued in the courts of this state, the nature and extent of his liability will depend upon the laws of the state or country where he derived his authority to administer the assets of the decedent. The assets of the deceased should be applied in the payment of debts, or be distributed among the next of kin, by our own courts, according to the law of that state or country, in the same manner as if the executor or administrator had been sued and called on to account in the courts of that state or country, and that is the comity of states as recognized by the 9th section of the Code. Why should the distributees of the deceased, who are citizens of this state, be compelled to go into the foreign state of Alabama to obtain their rights, when the courts of this state can afford them the same redress, as the courts of that state? Should the courts of this state presume that the courts of Alabama are more competent to administer the law applicable to the case, and send the plaintiffs there for that reason? When a foreign executor or administrator comes within the jurisdictional limits of this state, he is, in my judgment, liable to be sued here by the distributees of the estate which he represents, and to be made liable to the same extent as he would be liable according to the laws of the state in which he was appointed, and not otherwise. In what I have said, I have only expressed my individual opinion, and not that of the court.

3. But assuming the general rule to be, that an executor or administrator cannot be sued out of the state in which he was appointed, the special facts of this case, in our judgment, take it out of that general rule. It appears from the allegations in the plaintiff's declaration, that Jackson, the adminis-

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trator, has been sued by the plaintiffs and called on to account in that capacity, in the superior court of this state, and a decree rendered against him establishing the fact that he had wasted and appropriated to his own use the assets of his intestate's estate, to the amount of \$1,596 95. The plaintiffs also allege that the defendants are all residents of this state. The 2034th section of the Revised Code of Alabama declares that "any bond given by executors or administrators, as such may be sued or proceeded on in the name of any party aggrieved, until the whole penalty is exhausted." The plaintiffs have been aggrieved as they allege by a breach of the administrator's bond, and seek their remedy thereon against the defendants, who are alleged to be residents here, in the court of this state. The 3250th section of our Code declares that for every right there shall be a remedy, and every court having jurisdiction of the one, may, if necessary, frame the other. That the plaintiffs have a right to recover against the defendants, according to the allegations in their declaration, in so far as the court, is indisputably true. They cannot sue the defendants in Alabama for the simple reason, as it appears on the face of the plaintiffs' declaration, that they are not there to be sued but are residents in this state where they are sued. It was suggested on the argument, that to allow the defendants to be sued in this state and a recovery had against them here, would have the effect to withdraw the assets of the estate from the state of Alabama, and defeat the claims of creditors there. The reply to that suggestion is, that the plaintiffs, as distributees, would not be entitled to recover in the courts of this state any more than they would in the courts of Alabama, until the intestate's debts were paid, and the decree rendered against him, as set forth in the plaintiffs' declaration, established the fact, so far as the administrator himself is concerned, that he has wasted and appropriated to his own use the sum of \$1,596 95 after the payment of his intestate's debts, which amount the plaintiffs are now seeking to recover from the administrator and his securities on his administration bond, in the court of this state, of which the defendants are residents, as appears

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on the face of the plaintiffs' declaration, and which was demurred to for want of jurisdiction. It appears on the face of the plaintiffs' declaration, that the administrator and his securities were within the jurisdiction of this state, and that the administrator has in his own pocket, or is presumed to have, the sum of \$1,596 95, belonging to said estate, which he has wasted and appropriated to his own use, and to which the plaintiffs are entitled as distributees of the deceased intestate. In our judgment, the court erred in sustaining the defendants' demurrer for want of jurisdiction of the court and in dismissing the plaintiffs' action.

Let the judgment of the court below be reversed.

THE SAVANNAH AND CHARLESTON RAILROAD COMPANY,
 plaintiff in error, *vs.* DANIEL CALLAHAN *et al.*, surviving
 partners, defendants in error.

1. The contract price of the whole work was \$475,000 00 in bonds; not the aggregate amount of the estimates, either in cash or in bonds at the agreed rate.
2. The estimate cash prices of the work in detail, and the agreed rate at which bonds were to be counted when advanced on the estimates, were both provisional, and were intended for use in the temporary monthly settlements only. As the estimates were not to be the ultimate measure of compensation, so the agreed rate for the bonds was not to be the ultimate measure of their value.
3. For default in paying bonds, the measure of recovery is the actual value of the bonds when they ought to have been paid, with interest thereon.
4. The stipulation in the contract for retaining ten per cent. of the cash estimates until the completion of the work, provided that not more than \$25,000 00 in bonds at par should be retained as security, and in case of failure by the contractors to execute the terms of the instrument, then the amount so retained to be forfeited to the company, is in the nature of penalty and not stipulated damages. At all events, time is not so clearly of the essence of the contract as that the forfeiture of the whole sum would follow solely because the work was not completed by the last day fixed in the covenant, though it was completed in about one hundred days thereafter, and accepted by the company. This construction is favored by the fact that a part of the work was to be finished by one time and the balance

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by another; and, moreover, the contract contained a general safeguard of the element of time, which the company voluntarily failed to make use of, namely, a power in the chief engineer, in case the work should not be prosecuted with proper diligence, so as to insure its completion at the time specified, to put on an additional force at the expense of the contractor. See *51 Georgia Reports*, 348.

- j. As the record contains no sufficient evidence of the actual value of the bonds at the time or times of default in making payment, the judgment refusing a new trial is reversed on terms.

Contracts. Time. Damages. Before Judge TOMPKINS.
Chatham Superior Court. May Term, 1875.

Callahan and Drane, as surviving partners of the firm of McDowell, Callahan & Company, sued the Savannah and Charleston Railroad Company on an account. Their demand was set out in different forms in as many different bills of particulars, but may be briefly stated as follows:

1. For balance due on a contract to reconstruct a part of the Savannah and Charleston Railroad for the fixed amount of \$475,000 00 in bonds of the company, of which \$430,000 00 had been paid, leaving unpaid \$45,000 00 in bonds, which, reduced to currency at eighty cents in the dollar, amounted to . \$36,000 - 00
 2. For extra work not included in the contract, 6,336 - 38
 3. For interest accruing on an account current between the parties, 14,000 - 00
- Total, \$56,336 - 38

The substance of the plea was as follows:

The work done and materials furnished were under a written contract made on May 10, 1869. The agreement of McDowell & Callahan was to do the work and furnish the material specified by January 1st, 1870, which time was afterwards changed by consent of both parties to December 1st, 1869. They were to be paid at different rates of compensation for the various classes of work and materials provided for. The company agreed to pay the contractors upon and according to monthly estimates of the work done and materials furnished, to be made by the engineer of the company at the rates specified, in the following manner, viz: Ninety per centum of the amount of each monthly estimate

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be paid in certain bonds of the company, which the contractors were to receive at the valuation of eighty cents in the dollar; and the remaining ten per cent. of the amount of the monthly estimate, in bonds, to be reserved by the company as security for the performance of the contract, until the reservation should amount to \$25,000 00 in bonds. This reservation of \$25,000 00 in bonds was to be finally delivered to the contractors upon the performance of their part of the contract by the time and in the manner specified; but to be retained by the company as stipulated damages in the event that the contractors should fail to perform by the time and in the manner specified. The company agreed, if the contractors would finish by the time and in the manner specified, to pay them, over and above the aggregate of the monthly estimates, as much more in bonds as would make up the round sum of \$475,000 00 in bonds.

The contractors did not complete their contract by December 1st, 1869, and not until March 11th, 1870; and thus, as the contingency had not happened in which alone the company had agreed to pay more than the aggregate of the monthly estimates, it not only never came under any duty to pay more, but was entitled to retain the reserve of \$25,000 00, as stipulated damages. The aggregate of the monthly estimates, expressed in bonds, was \$462,625 14; and this was the value of all the work done and materials furnished by the contractors, at the prices fixed by the contract. The company paid the contractors \$430,000 00 in bonds, and retained the reserved \$25,000 00, leaving unpaid when the work was completed \$7,625 14 in bonds; equal, in currency at the market value (seventy cents) of the bonds at that time, to \$5,337 60.

The answer wholly denied the claim for extra work; it also denied the claim for \$14,000 00 for interest, as stated in the petition, but admitted a debt of \$2,101 19 on that account. And thus the whole amount in currency which the company admitted to be due was \$7,438 79.

The contract, which was the basis of this action, contained the following material stipulations: "In consideration of the

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payments and covenants hereinafter mentioned, the said McDowell & Callahan, party of the second part, agree to promise to furnish all necessary material, and to construct in a substantial and workmanlike manner, and to the satisfaction and acceptance of the engineer of the said railroad company, all that portion of the railroad company's road from the west end of Coosawhatchie trestle to its junction with the Central Railroad of Georgia.

This work consists of about forty-one (41) miles, including turn-outs, of clearing, grading, and track-laying, supplying ninety thousand (90,000) cross-ties, etc., etc.

* * * * *

"CONDITIONS.—Messrs. McDowell & Callahan agree, on the execution of this instrument, to commence the work at once at Coosawhatchie and Savannah trestle and bridge, and open the road to the Savannah river by the first of October, eighteen hundred and sixty-nine, and to the junction with the Central Railroad of Georgia by the first of January, eighteen hundred and seventy."

* * * * *

"It is mutually covenanted that monthly estimates of the work done by said McDowell & Callahan shall be made to the engineer of the company on or about the first of each month every month, beginning first of July, 1869, ninety (90) per cent. of which will be paid the contractors in the seven per cent. first mortgage bonds of the company, authorized to be issued by an act of the general assembly of the state of South Carolina, entitled 'An act to enable the Savannah & Charleston Railroad Company to complete their road,' passed on the second day of March, A. D., eighteen hundred and sixty-nine, at eighty (80) cents on the dollar, and ten (10) per cent retained until the completion of the contract; *provided that* not more than twenty-five thousand dollars of the bonds of the company at par shall be retained as security when payment in full shall be made. In case the contractors fail to execute the terms of this instrument, then this amount so retained to be forfeited to the company. Nevertheless, it

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understood that the iron rails, chairs, frogs, and spikes, be paid for in full upon being landed in Charleston or Savannah."

" And in consideration of the full and faithful completion of all work, of whatever character, between Coosawhatchie and the Central Railroad junction, in the time and manner specified, then the company agrees to pay to the said Messrs. McDowell & Callahan four hundred and seventy-five thousand (\$475,000 00) dollars of their above-described seven per cent. first mortgage bonds, issued for the re-building of their road, less previous payments made to said McDowell & Callahan."

* * * * *

" It is further mutually agreed by and between the parties to this contract, that should the party of the first part fail to comply fully and severally with the terms and conditions of this instrument, then the said Messrs. McDowell & Callahan, party of the second part, shall be exonerated fully and freely, as far as they are concerned, from the terms, conditions and covenants of this contract."

The jury found for the plaintiffs as follows:

Balance due in bonds, \$45,000 00, at 80 cents,...	\$36,000 00
Extra work (for detention, engines, etc.).....	400 00
Interest account,.....	2,101 19

Interest was allowed on the first two items, from March 11, 1870, (date of completion of work,) and on last, from October 1st, 1870.

The only finding questioned here is the first. It was admitted that the work was well done, but it was not finished in the time originally or subsequently agreed upon, and on this account the parties were at variance.

The plaintiffs contended as follows:

1st. That they were relieved from their obligation to finish work in the time agreed upon, by the conduct of the defendant in permitting the work to go on without objection at the appointed time had expired; by continuing after that time to make estimates and payments; by accepting and

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using the road when finished; by failing to put extra labor on the road when notified that it would not be finished time as per contract.

2d. That if wrong in this, then the contract price was \$475,000 00 in bonds and not \$462,625 14 in bonds; that the balance due is \$45,000 00 and not \$32,625 14 in bonds; that the \$25,000 00 in bonds, which was to be retained as security when payment in full was to be made, was a penalty and not liquidated damages; that the defendant has neither recouped its damage nor filed any defense setting up special damage caused by the delay in time; that it has claimed the right to retain the \$25,000 00 in bonds solely upon the issue that they were liquidated damages.

3d. That if they have not been relieved as to time, and if the \$25,000 00 in bonds are stipulated damages, then the \$25,000 00 in bonds were to be held as security when payment in full was made; that payment in full meant the payment of \$475,000 00 in bonds and not the \$462,625 14 in bonds, and if the damages are to be retained, they must be taken from the balance of \$45,000 00 and not from the balance of \$32,625 14. That if this view be correct, then there would be still due \$20,000 00 in bonds.

The position of defendant is fully set forth in the above synopsis of the plea.

The evidence did not show the value of the bonds to be paid, at the time or times of default on the part of defendant in making payment.

The court charged the jury substantially the law as laid down in the first two positions of plaintiffs and refused to charge to the contrary, in accordance with the view of defendant.

The court also refused to charge that the plaintiffs were entitled to recover no more than the market value of the bonds they were to receive when the work was finished; but, on the contrary, instructed the jury that the value of the bonds was fixed by the contract at eighty cents in the dollar, and that the plaintiffs were entitled to recover the value of the

bonds due them on the completion of the work at this percentage.

A motion was made for a new trial on account of error in the charge and in the refusals to charge, and because the verdict was contrary to the law and the evidence. The motion was overruled, and the defendant excepted.

JACKSON, LAWTON & BASINGER, for plaintiff in error.

HARTRIDGE & CHISHOLM, for defendants.

BLECKLEY, Judge.

1, 2, 3. In the argument here, counsel did not insist on an examination of the errors assigned on the charge of the court or on the court's refusal to charge. The question discussed was whether, upon the evidence, including a proper construction of the contract, the verdict could be maintained. We have announced our views very fully in the head-notes. We have no doubt that the contract fixes the agreed compensation for the whole work at \$475,000 00 in bonds. No final estimate is provided for. There were to be monthly estimates as the work progressed, but when all was finished then payment was to be completed in bonds, deducting those previously paid on the estimates. What was earned after the last monthly estimate was of no consequence, and no provision was made for ascertaining the amount. As the monthly estimates were provisional, so was the agreed value at which bonds were to be counted when advanced on those estimates. Whether the bonds were worth more or less than the agreed rate, was quite immaterial, if they had all been paid when due; but any failure to pay then entitled the contractors to recover the actual value of the bonds which ought to have been paid, together with interest.

4. There is more difficulty in settling the true construction of the contract as between penalty and stipulated damages. Such questions are among the most vexed in the law. Notwithstanding the hundreds, or perhaps, thousands of cases to

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found on the subject, each case must depend, in a great degree, on its own facts; and we think the facts of the present case give it a closer alliance with penalty than with stipulated damages: 11 How., 461; 10 Mich., 188; 9 Cal., 584; 38 Barb., 643; 1 McMullen, 106; 2 Ala., 425; 7 Pa. St., 470. Under the conduct of other authorities, such as 27 Eng. L. & E., 61, it might not be impossible to rule differently from what we do, but we abide by our deeper and better convictions, influenced somewhat by the special matters to which attention is called in the 4th head-note. The only complaint of the work was, that it was not finished in time. It was accepted, and the benefit of it was taken by the railroad company. The action is in the statutory form, and is so framed that the rule will apply to it which gives compensation, even where there has been a failure to perform strictly the terms of the contract: Addison on Contracts, 447-8; 13 Metcalf, 42; 2 Smith's Leading Cases, 14—Cutter *vs.* Powell, and notes. It was a question for the jury how much the value of the work, as compared with the contract price, was lessened by delay in completing it; and it was also for them to determine who occasioned the delay. We cannot say that the evidence on these points required a different verdict from that rendered.

5. The verdict is, however, unsupported by the requisite evidence as to the value of the bonds. It is clear that the jury counted them at eighty cents in the dollar, but that was because they were so priced in applying them to the monthly estimates. When applied to the main contract they should be counted at their real value, as we have indicated above. There is no dispute that the unpaid bonds were worth as much as seventy cents in the dollar; and this gives us a basis upon which to order a new trial, on terms. We consequently reverse the judgment, and direct that a new trial be had unless the plaintiffs below shall write off, so as to reduce their recovery by the difference between the unpaid bonds at seventy cents and at eighty cents; and if this shall be done, let the judgment, thus reduced, stand affirmed.

THE SOUTHERN LIFE INSURANCE COMPANY, plaintiff in error, *vs.* **EDWARD T. KEMPTON**, administrator, defendant in error.

(BLECKLEY, Judge, having been of counsel, did not preside in this case.)

1. An application for a policy of life insurance was made November 13th, 1871; at the time of the application the premium was tendered to the agent of the company at whose solicitation the application was made; the agent declined to receive it, stating that it would do when the policy was delivered, and that the applicant, if his application was granted, would be insured anyhow. On the 15th of November, 1871, the policy was issued; on the 9th of December, 1871, a letter was received from the agent by the applicant, stating that he was insured—that he, the agent, had his policy, and would be down the following week with the policy according to the arrangement; on the 15th December, 1871, the agent was at the town of the residence of the applicant with the policy; the applicant was sick, but an agent of his tendered the premium to the agent of the company, who declined to receive it and to deliver the policy unless the attending physician would certify that the applicant was in no immediate danger, the certificate was given, handed to the agent, and the money again tendered and the policy demanded, which was again refused; the applicant died on the 17th December, 1871.

Held, that on a bill filed for the recovery of the amount of the policy, equity will consider that done which ought to have been done. That under the circumstances it was the duty of the agent of the insurance company, who had received the policy from the company as the agent also of the applicant, and who had himself waived the payment of the premium when the application was made to him and had assured him that he would be insured anyhow, and had agreed to make the application for him, and had written to him that the policy was issued and ready for him, and he would deliver it the next week, to comply with his promise and to deliver it on payment of the premium by the applicant or his agent; and that it would be inequitable for the insurance company to refuse to pay the amount of the policy under these circumstances.

2. The issuing the policy on the 15th of November, 1871, and its delivery to the agent of the company, who was also then acting as the agent of the applicant, was a delivery to the applicant, and bound the applicant for the payment of the premiums, and the company on the policy from the date of such delivery to the agent.
3. The court did not err on the facts herein-before stated in declining to charge: "That after the deceased had become seriously ill, it was too late for him to bind the defendant by a tender of the premium, and the defendant was not bound to issue the policy after such a change in the health of the applicant;" nor was it error in the court to charge "that if the de-

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ceased made an application for insurance in regular form, and the same was accepted by the defendant, and a policy of insurance was issued and placed in the hands of an agent for delivery to the insured upon payment of premium, and said premium was paid or tendered by the insured, or agent for him, the defendant is bound for the amount of the policy, interest from the time specified in said policy of insurance."

4. In such a case as this, the principle that any change in the health of applicant between the time of the application and of the issuing the policy would relieve the insurance company from consummating the contract does not apply; the delivery to the agent, under the facts, was a consummation of the policy, and that, with the other facts proven, show a consummation of the contract under sections 2794 and 2821 of the Code.

Equity. Insurance. Contracts. Principal and agent. Delivery. Before Judge GIBSON. Richmond Superior Court. October Term, 1875.

Reported in the opinion.

W. H. HULL, for plaintiff in error.

HOOK & WEBB, for defendant.

JACKSON, Judge.

This was a bill in equity, brought by defendant in error against the plaintiff in error, to recover a sum due on a policy of insurance on the life of his intestate, Robert W. Scales, who died December 17th, 1871. Application had been made by Scales for a policy, which application was approved by the directors, and a policy filled up and signed, but was never delivered. The policy and the application were in evidence—produced, under notice, by the defendant. The application was dated November 13th, 1871, and was in usual form. It contained the following clause: "It is hereby declared * * that the policy of assurance hereby applied for, shall not be binding on the company until the amount of the first premium, as stated therein, shall be received in cash by said company, or some authorized agent thereof, during the lifetime of the person therein assured." On the back of the application was written:

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First quarterly cash premium,	\$39 69
Interest on deferred payments, 7 per cent.,	4 17
Policy fee and stamp,	1 50

First quarterly cash payment, \$45 34."

The policy bore date November 15th, 1871. It contained following clauses: "Nor shall this policy take effect, or in force, until the first premium is actually paid; and no one of this company has power or authority to deliver this policy until such premium is actually paid." "Agents of this company are not authorized to make, change, or release any contract of the company, or waive any forfeiture incurred under this policy."

The complainant's proof showed that Scales lived in Waynesboro; that McNair, an agent of the defendant, was soliciting applications; he took Scales' application, among others; Scales offered to pay the first premium then, but the agent said he could not receive it until the application was approved; he said it could be paid when the policy was delivered to Scales, that it made no difference, if his application was granted he would be insured anyhow.

E. F. Lawson testified, that on December 15, 1871, McNair was in Waynesboro, with the policy, witness told him if he would go with him to the ordinary's office, he (witness) would give him the premium on Scales' policy; McNair said he would not receive it on account of Scales' condition, but said he would if the physician would certify that there was no immediate danger, but when the certificate was got and shown to him he still refused; he also said he would deliver it, but was afraid the company would discharge him. Lawson stated that Scales was taken ill on the 9th or 10th, and was confined to his bed from that time till his death; his illness was serious; the disease was pneumonia. The physician's certificate referred to was read, dated December 13th, 1871, to the effect that "he is in no immediate danger." Mrs. Scales, widow of the deceased, testified that on Saturday, December 9th, her husband received a letter from McNair (which is lost) stating

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that his application was accepted, and he would be down the following week with the policy, according to agreement. ~~He~~ husband died of pneumonia; they had no apprehension of death until about two days before he died.

On this testimony, the court was requested by defendant's counsel to charge the jury, "that after the deceased had become seriously ill it was too late for him to bind the defendant by a tender of the premium, and the defendant was not bound to issue the policy after such a change in the health of the applicant," which the court refused, and charged "that if the deceased made an application for insurance in regular form, and the same was accepted by defendant, and a policy of insurance was issued and placed in the hands of an agent for delivery to the insured upon payment of the premium, and said premium was paid or tendered by the insured, or any agent for him, the defendant is bound for the amount of the policy, with interest from the time specified in said policy of insurance."

The jury found for plaintiff, and defendant excepts to the charge of the court, and this is the error assigned.

We do not see any error in the charge of the court under the light of the facts here proved. McNair solicited the application of Scales; declined to take the premium when he had succeeded in getting Scales to apply; stated to him that the payment made no difference, if his application was received and granted he would be insured any how; took charge of the application for him; got the policy issued; wrote to him before he got sick that he had it for him, and would bring it down the next week, and yet, when he did bring it down, refused to deliver it on tender of the money, agreeing to do it once, if a certain certificate was given him by the physician, but when that was done again refusing the money, and declining to deliver the policy to the agent of Scales. We think that these facts show a case where a court of chancery must intervene to prevent a fraud on the family of the deceased. The conduct of the agent appears to us wholly inexcusable, and we think that the company is bound by it in

case, under these facts. We think also that McNair, on the facts, became the agent of Scales to receive the policy for him; that he did receive it for him, and its delivery to McNair was a delivery to Scales. Besides, our Code does not make delivery essential in case other facts show a consummation of the contract: Code, sections 2794, 2821. Equity I consider that done which ought to have been done, and in this case the agent of the company, who was also the trustee-agent of Scales, ought to have taken the money tendered and to have delivered the policy he held for Scales. It was used before Scales was taken sick, long before; it was in the hands of McNair for Scales before the latter was taken sick, the date of McNair's letter shows, and it would be inequitable and grossly wrong to allow McNair to perpetrate for the insurance company such a fraud as this.

We recognize fully the doctrine laid down in *Bliss on Life Insurance*, 240 to 257; and in *Whitley vs. Piedmont & Arden Life Insurance Company*, 4 Bigelow, 362-3, that a change in health after the application and before the policy issues and is consummated, will relieve the company from its consummation; that good faith requires the insured to make known any change in health; but the facts here show no bad faith but the utmost good faith on the part of Scales. Besides, the facts here show an actual consummation of the contract, and such circumstances as would outrage equity if it was not consummated. It is true that the policy says that the first cash premium must be paid before it takes effect; but the facts here show a waiver of such payment, and an assurance to Scales that he would be insured from the date of the policy "*any how*," and we hold that this is such a case as demanded the reception of the money and the entire completion of the contract according to equity and good conscience. It would be unjust, we think, to the dead, and to the family he left, not so to hold; and we are gratified that we are enabled by the law and the principles of equity so to hold without doing violence to either. In every view we can take of the law, and the facts disclosed in this record, we think that the insurance company should

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pay this money, and we affirm the judgment, and lay down as the legal principles which control the case the views expressed in the head-notes to this opinion.

Judgment affirmed.

JOHN A. URQUHART, plaintiff in error, vs. VIRGINIA A. OLIVER, defendant in error.

The act of 1866 and the constitution of 1868 made a sweeping and radical change in the *status* of married women in respect to rights of property. Prior to this change, separate estates depended generally on the express provisions of marriage settlements, wills and other conveyances; now they exist by virtue of the general law of the land, as a universal rule of property. The restrictions in the Code upon the testamentary power of married women are, therefore, no longer of force, or, at all events they are inapplicable to separate property acquired since the act of 1866. As to such property, the wife may make a valid will of realty or personalty without the consent of her husband.

Wills. Husband and wife. Before Judge JAMES JOHNSON. Muscogee Superior Court. May Term, 1875.

Reported in the opinion.

BLANDFORD & GARRARD, for plaintiff in error.

PEABODY & BRANNON, for defendant.

BLECKLEY, Judge.

A married woman made a will in September 1869, and died in 1873. Her husband gave no consent to the will; indeed, did not know of it till after her death. Upon its being propounded for probate, he entered his caveat on that ground, and supported it by proof. It appeared in evidence that the testatrix had been his wife for forty years, and had lived with him happily until her death. She died without children, leaving him her only heir-at-law. Her will specified no par-

her property, but disposed, in general terms, of her estate. Her husband was made residuary legatee; and the only other beneficiary was one of \$5,000 00 to a niece of the testatrix. Her will, it seems, consisted of real estate of the probable value of \$5,000 00, which she held by virtue of a deed from Bozeman, dated in June, 1869. The deed was an ordinary conveyance to her, her heirs and assigns, in fee simple, with no creation of separate estate and no express power of disposition.

The question is whether her will was valid, the same having been made without the husband's consent; and its invalidity urged, by his counsel, upon the provisions of the Code, sections 2405 and 2410. Section 2405 is this: "Every person is entitled to make a will unless laboring under some disability of the law. This disability arises either from a want of capacity or a want of perfect liberty of action." Section 2410 reads thus: "Married women are incapable of making a will for want of perfect liberty of action, being presumed to be under the control of their husbands. A married woman may make a will in the following cases: 1st. Where express power is given to her to will her separate estate is reserved or granted to her by the instrument creating the same, or by marriage contract; 2d. When, having a separate estate absolutely, or an estate in expectancy, her husband consents to her disposing of the same by will; 3d. Where her will is in execution of a power vested in her; 4th. Whenever, by reason of the abandonment of her husband, or a divorce from bed and board, or for other cause, the law declares her to have the right of a *feme sole* as to her own earnings." In 36 *Georgia Reports*, 500, there was an instruction of this last section in reference to the husband's consent. It was there said the consent was necessary only when the estate disposed of was one in expectancy. The decision of that question was not required for the case, which depended altogether on the previous law, the testatrix having died in 1851, long before the Code was adopted.

In dealing with the present case we proceed quite independently of any prior decision of this court upon the direct
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question. And we observe that when the Code went into effect, the *general* rule of law was that married women enjoyed no rights of property; such rights, as to them, were special and exceptional; separate estates depended on the express provisions of marriage settlements, wills, and other conveyances. The Code was framed and enacted with reference to such a general law and such a public policy, as may be seen by reference to section 2410, above quoted. It speaks of the instrument creating the estate. Such instruments were then necessary, in most cases, for separate estates to have any existence. But a great and radical change has been introduced by the act of 1866, supplemented and confirmed by the constitution of 1868, the former of which provides (Code, section 1754,) that "all the property of the wife at the time of her marriage, whether real, personal, or *choses* in action, shall be and remain the separate property of the wife, and all property given to or acquired by the wife during coverture, shall vest in and belong to the wife, and shall not be liable for the payment of any debt, default or contract of the husband." And the latter provides that "all property of the wife in her possession at her marriage, and all property given to, inherited or acquired by her, shall remain her separate property and not be liable for the debts of her husband." The law of inheritance is also changed. By the act of 1871 the husband has ceased to be the sole heir of the wife when she dies intestate, leaving children or descendants of children: Code, section 2484.

A wholly new rule of property is thus introduced. With reference to all they own, women remain, after marriage, as effectually separated from men as they were before marriage. The husband has as little interest in, or control over, his wife's property as she has in or over his, indeed less, for she is entitled to be supported out of his, and when necessary is recognized by the law as his agent to charge it with her support; whereas, his power and control over her property, rests, in all cases, upon her voluntary consent. She is thus his full equal before the law in the ownership and control of property.

at reason, then, any longer exists why she should be de-
 ed below him in the power of disposition, a power which
 law annexes as an incident to full, complete and absolute
 ership? Even the right of sole inheritance has been taken
 y from the husband; and upon that right or the analo-
 s one of taking by administration, rested chiefly, at com-
 law, the husband's negative upon the wife's testament.
 er the statutory provisions now of force he takes no greater
 rest in her property after her death than she takes in his
 r his death. So far, therefore, as such an interest is con-
 ed, there is the same reason for giving her a negative upon
 will as for giving him a negative upon hers. It is true
 : so much of the argument as rests upon the act of 1871,
 ng the rules of inheritance, does not apply directly to
 particular will we are considering, if we regard the date
 the will instead of the time when the testatrix died; but
 latter date is the controlling one, for until then the will
 no effect. Even if that act were out of the way, our
 ding would be the same; for the fundamental change
 ught in by the act of 1866 is sufficient to abrogate, as
 eral law, the restrictions imposed by the Code. It may
 that these restrictions are still in force with reference to
 tes depending upon instruments executed before the act of
 66 was passed; possibly they may be of force in relation
 later instruments which expressly create separate estates
 limit the disposing power over them. But what we dis-
 tly rule is, that a separate estate, arising by operation of
 upon ordinary conveyances, or upon other means of ac-
 ring property, is not amenable to the restrictions of the
 le; and that, as to such estate, the wife enjoys a power of
 osition by will independent of and free from the hus-
 d's consent or non-consent.

f, under the new order of things, the restrictive terms of
 Code, with reference to the will of a married woman, still
 ly, why would not the restrictive terms in reference to
 acts apply also? Section 2730 of the Code declares that
 e contracts of a married woman are generally void." Is this

law since the act of 1866? Are not the contracts of married women as universally valid as those of men, except in a few instances expressly prohibited? 39 *Georgia Reports*, 41.

Thus far I have spoken for the court, and what I have said I understand to express the clear and decided conviction of my brethren; but I have, myself, very grave doubts as to the legal accuracy of the conclusion at which they have arrived. I am not certain enough that I am right, and they wrong, to warrant me in dissenting from the judgment of the court; but my doubts are too strong for me to feel justified in concealing them, or in suppressing the reasons upon which they are founded. By the ancient common law, and as it was construed down to the time of Blackstone, I think a married woman could not make a testament disposing of her own property without the consent of her husband, unless she did it in the execution of a power. Blackstone says: "In reality the woman makes no will at all, but only something like a will." This he says in consequence of the rule that she had to act, in making a testament, altogether upon his license. Married women were expressly excepted out of the statute of wills: 34 and 35 Hen. VIII. In 1789, was decided the case of *Fettiplace vs. Gorges*, 1 Vesey junior, 46, and in that it was held, that where personal property is given to a *feme covert*, to her sole and separate use, she may dispose of it by will without the assent of her husband. This seems to have gained recognition as law: See 1st Williams on Executors, 46, 47; 2d Story's Equity, sec. 1388 to 1893. Conceding it to have been law in Georgia prior to the Code, and conceding, also, that our general policy of putting realty and personalty upon the same footing would make it apply to both alike, yet it seems to me that the codifiers restored the strict common law rule, and for some reason which I cannot conjecture, subjected married women, in the matter of testamentary power, to a qualified control by their husbands. The Code is very express; and I wholly reject the softening of it which was attempted in 36 *Georgia Reports*, 500. My conviction is clear that a true reading would make the husband's consent as necessary for disposing of as

possession as an estate in expectancy. It seems to me every arbitrary distinction to qualify the latter part of the act and not the former. Allowing that the Code means what it does, is it repealed by the act of 1866, and the act of 1868? Repeals by implication are not favored. The act nor the constitution undertakes, in direct terms, to alter the powers of married women over their separate

property. They simply increase the volume of the property; but does this addition involve augmentation? We refer to the act and the constitution to find out what is separate property; but should we refer to them to find out how that property may be transmitted? May there be one law for the acquisition of estates, and another for the disposition of them? Are not the two separate and distinct matters? Married women could always, in England, hold as separate property, and yet they were excluded from the English statute of wills. Possibly, with all the change and progress which has been made in Georgia on this subject, it may have been thought by the legislature that it was going far enough to allow married women to retain all their property, use it as they please, sell it, trade on it at will, without abrogating the old rule restraining them, in any way, from disposing of it by will. If otherwise, why did they not change the Code expressly? I confess it seems to be in harmony with our modern ideas, and with the policy which has been taken, to do away with all restrictions.

But what I look at is, they are left standing in the Code.

To abide by the letter of the Code, and to hold that a husband can interfere with his wife's will, has the appearance of taking a step backward. It is turning round and going toward the past. It may be over-conservative. I do not dissent. I am content and am firmly affirmed.

Thomson vs. The Ocmulgee Building and Loan Association.

METHVIN S. THOMSON, plaintiff in error, vs. THE OCMULGEE BUILDING AND LOAN ASSOCIATION, defendant in error.

As the defendant was found to be indebted to the plaintiff a definite sum at the date of the agreement referred to in the decision, interest was properly allowed thereon.

Interest. Before Judge HILL. Bibb Superior Court, April Term, 1875.

Reported in the decision.

NISBET, BACON & HINES, by G. W. GUSTIN, for plaintiff in error.

LANIER & ANDERSON, for defendant.

WARNER, Chief Justice.

This case came before the court below on exceptions to the report of an auditor, which were referred to the decision of the court, both as to the law and the facts, under the evidence submitted, without the intervention of a jury. The auditor in his report, found that Thomson was indebted to the association the sum of \$1,634 65, with interest thereon from the 6th of December, 1873. The court, after considering the report made by the auditor, as well as the evidence on which the same was founded, confirmed the report; whereupon Thomson excepted.

The errors insisted on here are that the court held that the association had not finally suspended and quit business, under the agreement of the 6th of December 1873, as set forth in the record, as contemplated by the former decision of the court between the same parties, in the 52d *Georgia Reports* 427; and in allowing interest on the amount found to be due from the date of that agreement. By the agreement of the members of the association, its operations were merely suspended until its mortgage securities, which were in the p

collection, could be realized on, and in the meantime the payment of the monthly dues of its members, as required by its charter and by-laws, was to be dispensed with and suspended until a reasonable time was had to collect said dues, but if said securities should not yield enough money to keep up said association as contemplated by its charter, then the payment of said monthly dues was to be resumed at such time as the board of directors should determine, upon reasonable notice being given to said members. Thus it will be perceived that the aforesaid agreement did not, by the terms thereof, contemplate the final suspension and winding up of the business of the association. The object of the agreement was, to keep it until it could be ascertained what was the amount of assets of the association which could be realized from those who had given mortgage securities to it, one of whom was the plaintiff in error. The auditor found from the evidence before him that the plaintiff in error was indebted to the association the sum of \$1,634 65 at the date of the aforesaid agreement; in other words, that he owed the association that amount of money, and that being so, and having retained the same in his own hands, instead of paying it to the association, he was liable for the payment of interest thereon up to the date of the judgment. The court confirmed the auditor's report, and we find no error in its judgment in view of the facts contained in the record.

the judgment of the court below be affirmed.

IN *RANSONE*, plaintiff in error, *vs.* *HOPE H. CHRISTIAN*, defendant in error.

action for libel is not amendable by adding a count for trespass to the person, especially if the trespass, at the time the amendment is proposed, is barred by the statute of limitations.

Defendant to a suit for libel, pleading justification, assumes the burden of proof, and is entitled to open and conclude nor is his right forfeited by the fact that he withdrew the plea at the beginning of the trial and did not

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renew it until the plaintiff had proved the libel; it is his right to amend at any stage of the trial, and his exercise of one right cannot forfeit another. When he amends the court may put him upon terms, but those terms should be presented at the time he offers to amend, and should not extend beyond the continuance of the case, or the payment of costs, or such similar penalty.

3. Whilst counsel should argue legal points to the court and not to the jury, it is his right to state his legal positions to the jury; this right is indispensable to an intelligent presentation of his case, and argument of the facts and application of the law thereto; and its denial, or serious restriction, would virtually destroy the right of parties to be heard by counsel before the jury, and consequently full and fair trial by jury. It is impossible for counsel to foreknow what view the court will take of the law until the charge is given; he must, therefore, state to the jury what he believes the law to be, and what he thinks the court will sanction, and on the basis that such a principle will be pronounced law and is the law, he may argue the facts and apply them.
4. To sustain a plea of justification of a libel charging perjury, two witnesses, or one witness and corroborating circumstances, are necessary, but such corroborating circumstances need not "be sufficient to amount to another witness or sufficient to support one to that extent." It is enough if the circumstances corroborate the one witness to the satisfaction of the jury. It would puzzle them to calculate the precise length of a chain of circumstances exactly equal to the testimony of another witness.
5. It is the proper practice not to read at all to the jury those requests to charge which the court designs to refuse; the reading aloud and refusal, and manner and emphasis thereof, might have the effect to prejudice the case of the party requesting the charges.
6. Nominal damages mean in law some small amount sufficient to cover and carry the costs, and when requested in writing so to charge the jury, the court should do so, where any view of the facts proven justify a charge upon the subject.
7. When the declaration alleges no special damage and no proof is made thereon, a request in writing to charge the jury that no special damage can be found by them, is legitimate, and should be given.
8. It is unnecessary to prove malice when the libel charges a crime, such as perjury, whether the libel be printed or merely written.
9. Though a libel be indictable and punishable on the criminal side of the court, yet, in the absence of all evidence of an indictment therefor and verdict and fine thereon, the civil damages should not be lessened or mitigated.
10. The court, though requested in writing, need not go into an elaborate explanation to the jury of general propositions in reference to the different species of damages which the jury may give in torts; it is enough if the law of the case be given to the jury and so applied to the facts that they may easily understand it. General propositions do not enlighten but tend

cloud the minds of the jury; a distinct application of controlling principles to the facts of the particular case is what they need.

If the plaintiff, six months after the libel had been sent to him, made a meditated attack upon the defendant, in the night, with a repeater pistol, fired upon him first, and if defendant acted in self-defense, and after had received the wounds which injured him, advanced upon plaintiff, was firing upon him from behind a tree, and reached his pistol around tree and shot plaintiff, to dislodge him, and even shot him again as he retreated, plaintiff is responsible in law to defendant for the injuries he incurred; and the defendant, under our statute and the ruling of this court upon in this case, having filed his plea to set off these personal injuries against the damages of plaintiff for the libel, was entitled to have them allowed and set off by the jury; and the court, his attention having been called thereto, should have charged the jury that if they believed from the evidence the foregoing facts, they should so find. A libel, six months before such a premeditated attack, however severe and exorbitant, cannot justify it after passion has had so much time to cool and reason to resume sway.

libel. Amendment. *Torts*. Justification. Practice in Superior Court. Witness. Charge of court. Damages. Off. Before Judge WRIGHT. Early Superior Court. October Term, 1875.

reported in the opinion.

JOHN C. RUTHERFORD, for plaintiff in error.

J. HOOD; H. & I. L. FIELDER; R. H. POWELL, for defendant.

BLACKSON, Judge.

This is an action for libel. It was before this court before the libel and general facts touching it will be found reported full length in 49 *Georgia Reports*, 491. They need not, before, be repeated here. A new trial was then granted and case was tried again; the jury found a verdict of \$3,000 00 for the plaintiff; a motion was made for a new trial, overruled, and exception taken, and the case is before us for reversal. We shall take up the errors assigned and dispose of them as we deem necessary for the proper adjudication of the

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1. The defendant pleaded as a set-off injuries inflicted on him by the plaintiff from pistol wounds, by authority of section 3261 of the Code, and of the ruling of this court when the case was here before. The plaintiff thereupon moved to amend the declaration by alleging injuries to his person by defendant, in the same transaction. The court permitted the amendment, and defendant excepted. The trespass proposed to be inserted by way of amendment is a new and distinct cause of action, and cannot be allowed: Code, section 3480. Besides, it was clearly barred by the statute of limitation when offered, and for that reason it should have been refused by the court. It may be said that it did not become necessary to put it in until the defendant's plea was allowed, and that being allowed, plaintiff should be permitted to amend now, though his cause of amendment is distinct from his cause of action and barred too. The reply is, that the plea was in time, not barred; and that plaintiff had the right to join this action with the libel when he sued, or to sue on it at any time until he was barred. It was his own fault, if by his laches or mistake of law as to defendant's right to plead the set-off, he has lost his right to sue on the tort to his person. The reasoning which defeats him, seems to us satisfactory; at all events, the statute is explicit and must be obeyed.

2. The defendant pleaded justification but withdrew his plea. Plaintiff then proved the publication of the libel. Defendant then renewed the plea of justification, assumed the burden of showing the libel to be true, and claimed the right to open and conclude the argument. The court held that he had not the right, but had forfeited it. When the plea of justification is made the defendant assumes the burden of proof, and is entitled to open and conclude: Code, section 3051. He may amend his plea at any stage of the trial: Code, section 3479. By exercising the right to amend, did he lose the right to conclude? It would be strange if the exercise of one legal right forfeited another. It is true that the court might have imposed terms upon him when he amended, but the terms should have been at that time pro-

ibed. It looks like an *ex post facto* punishment to fix the terms after the thing is done. Besides, the terms should not, think, extend beyond continuance of the case, or payment costs, or some such penalty. At all events they should be ended at the time the amendment is proposed and allowed.

3. In the course of his argument, counsel for defendant addressed to the jury: "Now, if Christian made the first attack on Ransone, and Ransone acted in self-defense to repel the attack, then, under the law, Christian was liable for all injuries he inflicted on Ransone, and Ransone would not be liable for any injuries he might have inflicted on Christian;" whereupon the court stopped counsel, and said he was arguing with the jury, which the court would not allow him to do, and he must argue the law to the court. This interruption and refusal by the court to permit counsel so to present his case is complained of. The interference of the court was doubtless based on the third rule of court, which requires questions of law to be argued exclusively to the court. Properly understood, the rule is a good one, and should be enforced. We take it to mean that in cases where counsel is making a legal argument or battling to establish a legal principle which he wishes the court to charge as the law of the case, he must argue to the court; but we cannot suppose it was intended to prevent counsel from stating legal propositions to the jury. If so, it would destroy all trial by jury by preventing counsel from intelligently discussing their cases before them, and the rule would be utterly void: Constitution, Code, section 5121. Counsel cannot know what the court will charge; they cannot lay down to the jury the law as he will charge it, unless they be gifted with fore-knowledge; they must, therefore, be allowed to lay down to the jury the law which they think the court will charge, or, in other words, their own view of the law; and in the light of that law argue the facts. To curtail this right within the narrow compass suggested by the ruling of the court below, would be to close the mouth of the counsel, and to overthrow all fair and full trial by jury. No harm can be done by the other course. All that counsel

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says is in the hearing of the court; the law he lays down subject to the correction of the court, and to make a practical speech to the jury he must exercise the right to state his legal points to them. "There is reason in roasting eggs;" and statutes and rules of court must be so construed as not to set great and fundamental rights.

4. The court charged the jury that where there was but one witness to the proof of the truth of the libel, the corroborating circumstances "must be sufficient to amount to another witness or to support the one witness to that extent." To corroborate means to strengthen, and the Code simply declares "corroborating circumstances may dispense with another witness" in order to convict for perjury: Code, section 3755. We think the circumstances should be such as to convince the jury—such as so to strengthen the one witness as to induce them to believe that he has sworn truly, and that the plaintiff swore falsely, and that the plea is true. If the jury are satisfied with the weight of the corroborating circumstances it is enough. There must be sufficient corroboration to satisfy them, and how much would be exactly equal to the weight of another witness it would be hard for us to prescribe or for them to calculate. Such, we think, too, is authority on this point. Greenleaf says: "But it is not precisely accurate to say that these additional circumstances must be tantamount to another witness. The same effect being given to the oath of the prisoner as though it was the oath of a credible witness, the scale of evidence is exactly balanced, and the equilibrium must be destroyed by material and independent circumstances before the party can be convicted. The additional evidence need not be such as, standing by itself, would justify a conviction in a case where the testimony of a single witness would suffice for that purpose." 1 Greenleaf, 257. We think, therefore, the court erred on this point.

5. It is complained that the court read many of defendant's requests to the jury and declined to give them. We think the proper practice would be not to read them at all to the jury unless the court meant to give them as written, or in a

d form. If he means to refuse them, it is not necessary to read them; it can do no good; it might harm the making the request. The jury, ignorant of law, might be that the court, emphatically declining to give a request by one party meant that the party had mistaken of his case, and could not recover. It is better and it to read them aloud to the jury.

he court was requested to charge what was the mean- nominal damages in law, that it was only slight dam- ough to carry costs. The court, though charging upon ject, declined to give this. We think he should have ged.

he court also erred, we think, in declining to charge e jury could not give special damages on the count for at count having alleged none and none being proven. e think the court was right in declining to charge this libel was written and not printed, malice must be . The libel charged a crime, and malice is implied: nleaf, 418.

e think he was right, too, in declining to charge that : a libel was punishable criminally, the plaintiff was itled to full damages in his civil suit. There was no e that he had ever been indicted, found guilty and xl for the offense, and the fact that he might possibly o remote to be considered in mitigation of damages.

There were a number of requests made explanatory of erent elements that make up damages, and the various of damages and other similar generalities, which we he court properly refused; but in refusing them, it ap- hat he read from section 3065 to section 3074 of the nclusive, which did not probably much enlighten the the law of this case. To give generalities, abstract itions of law, to the jury in charge, would be error; to to give them, and yet read nine sections of the Code t explanation, seems to us equally erroneous. What y need is a clear explanation of the law of the case at

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ar, and its plain application to the facts. If they believe such and such facts to exist, then such is the law.

11. In this case, on the plea of set-off here filed, we think that the court, having been requested to charge that if plaintiff began the fight and made the first attack upon defendant, then he was liable for the injuries to defendant's person, ought to have charged that if plaintiff, six months after this alleged libel had been sent to him, made a premeditated attack upon defendant at night with a repeater pistol, and fired first upon him, and if defendant acted in self-defense, though using a similar deadly weapon, and after he had received the wounds which injured him, advanced upon plaintiff, who was firing upon him from behind a tree, and reached his pistol around the tree and shot plaintiff to dislodge him, and even shot him again as he retreated, then plaintiff is responsible in law to defendant for the injuries inflicted, and that the jury should set them off against any damages they might assess on the suit for libel; and that if this attack was made six months after the libelous letter was sent to plaintiff, such letter, however libelous and false and abusive, could not justify such an attack at such length of time. Passion should have cooled and reason resumed its sway to such an extent at least as to prevent all efforts at homicide. In respect to the question of how far the plea of justification has been sustained, we say nothing, because another jury will pass upon it; nor will we undertake to measure the damages for the libel, if the plea of justification be not sustained, on the one hand, nor the injuries to defendant's person by the plaintiff's night attack, on the other. We think that defendant has not had the law of his case properly laid before the jury, in the view we entertain of it, and therefore we grant a new trial.

Judgment reversed.

CLARKE & WILSON, plaintiffs in error, *vs.* **LIZZIE TRAWICK**,
defendant in error.

When the sheriff, pending an application by the defendant for homestead, sold the land subject to the homestead right, reserving it in the deed made by the purchaser, the homestead, on afterwards being set apart, is subject to levy and sale at the instance of another creditor whose judgment is for a debt existing prior to the adoption of the present constitution.

The sheriff's deed is not admissible as title without the *fi. fa.*, or without proper secondary evidence if the *fi. fa.* cannot be produced. Neither is it admissible as color of title unless, on the case made, it is relevant as such.

Due diligence in searching for a superior court *fi. fa.* traced into the sheriff's office, and not there now nor known to be elsewhere, requires search in the clerk's office also, since it is to that office that all executions issued therefrom are ultimately returnable.

Homestead. Levy and sale. Evidence. Deeds. Before Judge POTTLE. Hancock Superior Court. October Term, '75.

Reported in the opinion.

J. T. JORDAN, for plaintiffs in error.

GEORGE F. PIERCE, Jr., for defendant.

BLECKLEY, Judge.

Land was sold by the sheriff in June, 1869, under judgments rendered in April of that year. It does not appear from the records upon what the judgments were founded, nor do we deem it material in the present case. At the time of the sale, an application by the defendant for homestead in the land was pending before the ordinary. The sheriff, being notified of the application, announced publicly that the land could be sold subject to the right of homestead; and after this announcement, he so sold it. He made the announcement at the instance of the defendant; and George F. Pierce, Esq., who was acting at the time as the defendant's attorney, took part in making or procuring it to be made. Mr. Pierce became the purchaser, at the price of \$480 00, and the sheriff exe-

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cuted to him a deed in the usual form, except that it contained a reservation in these words: "Provided, nevertheless, this deed nor sale is to impair the right of said defendant nor his family to a homestead in said land, of the value of \$2,000 00 in specie, as is granted to the citizens by the constitution and laws of said state; but this deed is made subject to said defendant's rights to said privileges he may hereafter assert in the proper courts of the country." Several months afterwards, Mr. Pierce, by quit claim deed, conveyed all his right and title to the defendant's wife, the present claimant. The purchase money was the same in amount as that paid out by Mr. Pierce, and was raised by her by borrowing on her own credit. The homestead was set apart, but at what time does not appear, further than that it was subsequent to the sheriff's sale. In 1873 the whole tract was levied upon as the property of the same defendant by virtue of a judgment rendered in 1872, in favor of the plaintiffs in error, Clarke & Wilson. This judgment was for a debt which existed prior to the constitution of 1868. The defendant's wife interposed a claim to the whole tract, and on the trial of the claim the verdict was in her favor. The plaintiffs moved for a new trial, and for error in overruling that motion this writ of error was brought.

1. One ground of the motion is, that the verdict was contrary to evidence; and we think it was, to the extent of the homestead estate. To that the claimant exhibited no title whatever. Her title consisted wholly of the sheriff's deed to Pierce, and of the deed from Pierce to her. The sheriff did not sell nor attempt to sell the homestead. When he excepted it in the terms of sale and in the deed, it was the same as if he had excepted it in his levy. If the judgments under which he was proceeding were based on contracts made prior to the adoption of the present constitution, he could have sold the homestead right, notwithstanding the pending application; but the power to sell it, if such power existed, was not exercised. He gave public notice that he would not exercise it. The purchaser not only acquiesced in that notice, but took part, as the defendant's attorney, in promulgating

ring it to be promulgated. Whether those judgments be homestead or not, the plaintiffs in them could certainly spare the homestead right if they had thought to do so, by excepting the same, either from the levy or the sale. The sheriff, with or without authority of the plaintiffs, could do the same thing. His assumption of authority, would simply have left him answerable to the plaintiffs for any injury they may have sustained from his neglect, but it would in nowise have altered the fact of his conduct. Taking all the facts of the case, we think the defendant asserted a homestead right in the land to the value of \$2,000 00, and that both the sheriff and the purchaser under him acquiesced in the right claimed. If the sheriff had afterwards resisted the laying off of the homestead, it might have been met successfully by the doctrine of *res nullius in terra nullius*. He was instrumental, as the defendant's attorney, in making the sale restricted as it was; and the deed which he executed showed on its face that the homestead was not to pass. In some cases there is a distinction between selling property subject to incumbrances generally, and subject to a particular incumbrance specifically mentioned. See 98 Massachusetts, 305; 50 Georgia Reports, 316. *Ibid.*, 316. If the present case rested alone upon this distinction, our ruling would, perhaps, be maintainable; but as still stronger support, for an incumbrance proper to some right that has already passed out of the defendant, or which has been created in some other person; and, the interest here involved was one abiding in the defendant himself. There was no attempt to sell *all* his title and interest, as is usually done, but a particular which *he* claimed was expressly excepted. The exception was not of something to be asserted by a third person, as in the case of incumbrances proper, but of something to be asserted by the defendant himself. In other words, he insisted on reserving a certain interest in his land left in himself, and the sheriff yielded to his claim and sold accordingly. After that interest was definitely ascertained and set apart,

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and thus matters stood when the whole land was seized again by other creditors, against whom the homestead right, spared before, would not prevail.

It was suggested in the argument, though it does not appear in the record, that the whole of the tract was embraced in a homestead as laid off. Should this appear to be true upon the next trial, we direct that, as judgment creditors of a defendant have had the benefit of the purchase money heretofore paid to the sheriff, the amount thereof, without interest, be refunded to the present claimant, out of the proceeds of the next sale, provided the claimant shall, before another sale is advertised by the sheriff, file in the clerk's office, and have recorded, a quit claim deed to the defendant of all her right and title to the whole tract, whether in possession or in reversion. We give this direction the more readily because counsel for plaintiffs in error, when the case was argued, expressed a willingness that the claimant should be allowed her purchase money if the land were made subject to re-sale.

2. In the progress of the trial the claimant offered in evidence the sheriff's deed to Pierce, without producing or accounting for the *fi. fas.* under which the sheriff sold. The court admitted it over the objection of the opposite party. We think this was error, if the purpose was to treat the deed as anything more than color of title; and as mere color of title, it was not relevant to the other facts of the case. There appears to have been no statement of counsel that it was expected to make it available as color of title. We think the deed should have been rejected: 15 *Georgia Reports*, 343; 16 *Ibid.*, 593; 20 *Ibid.*, 689; 10 *Ibid.*, 74; 24 *Ibid.*, 494.

3. Later in the trial, claimants offered secondary evidence of the *fi. fas.* under which the sheriff sold the land. As preliminary proof, it was shown, presumptively, that the sheriff who made the sale turned them over to his successor, the present incumbent; and the latter testified that he had searched his office and could not find them. We think the showing was complete as to the sheriff and the sheriff's office, but it ought to have gone further and disclosed search in the clerk's

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office. All executions from the superior court are ultimately returnable to the clerk's office; and when they have been traced into the sheriff's office and are shown to be no longer there, the presumption is, in the absence of proof to the contrary, that they have been acted upon finally by the sheriff and passed into the clerk's office. Reasonable diligence to find them has not been exhausted until search has been made there: 6 *Georgia Reports*, 188; 7 *Ibid.*, 264; 10 *Ibid.*, 253. We do not think that any question of fraud was involved in the proven facts of the case. It was not error for the court to refuse the charge requested on that subject. The plaintiff's right to sell the homestead results from its never having been sold, and not from any fraud in the prior sale. In so far as the court's charge recognizes that sale, (assuming it free from fraud) or the deed made under it, as an obstacle to subjecting the homestead now, under the present levy, the charge is error. It is not clear, from the charge itself, that it was intended to mean anything inconsistent with our own views; but construing it in the light of the court's refusal to grant a new trial, there is a strong probability that the judge below did not agree with us on the main point in the case. We understand what he *did* better than the imperfect report before us enables us to understand what he *said*.

Judgment reversed.

ANDERSON ATTAWAY, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

1. There was sufficient evidence in this case to sustain the verdict.
2. Newly discovered evidence to the effect that a witness is prepared to swear that she heard a person other than the defendant admit that she did the criminal act of which defendant was convicted, will not authorize a new trial.

Criminal law. New trial. Before Judge McCUTCHEN.
Bartow Superior Court. July Term, 1875.

Attaway vs. The State of Georgia.

It is only necessary to state that the newly discovered evidence was embraced in the affidavit of one Nancy Reeder, to the effect that she, in company with three other parties, heard Sallie Russell say that Anderson Attaway did not cut or assault William Vaughn at the time and place charged in the indictment, but that she, Sallie Russell, cut him; that Vaughn requested her to say nothing about the difficulty, stating that he would fix it on some one else; that she did the cutting on account of some improper conduct on the part of Attaway to her. That she never disclosed these facts to Attaway or his counsel until after the trial.

The usual affidavits of the defendant and his counsel as to the evidence being newly discovered, were also annexed.

WARREN AKIN & SON; J. L. & J. M. MOON; RICHARD H. FIELD, by ABDA JOHNSON, for plaintiff in error.

A. T. HACKETT, solicitor general, by E. P. HOWELL, for the state.

WARNER, Chief Justice.

The defendant was indicted for the offense of an assault with intent to murder and on his trial therefor was found guilty. A motion for a new trial was made by the defendant, on the ground that the verdict was contrary to law and the evidence, and for newly discovered evidence since the trial, which motion was overruled by the court, and the defendant excepted.

The assault was committed in the night, and the only point upon the evidence was as to the identity of the defendant, which was established from the evidence before the

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rize any court to grant a new trial on that ground. There was no error in overruling the motion for a new trial.

Let the judgment of the court below be affirmed.

LOUIS DE SAULLES & COMPANY, plaintiffs in error, vs. GEO. G. LEAKE, defendant in error.

1. If, in charging the jury on any material point, the judge expresses an opinion as to what the proof shows, or what is true according to the evidence, it is error for which a new trial must be granted by the supreme court.
2. It is not error to repeat what is admitted by one of the parties; and that the admission was made, if so stated in the charge, will be taken as true, unless it be otherwise certified in the bill of exceptions.
3. An erroneous charge on irrelevant evidence, or touching a matter wholly immaterial to the merits of the controversy, is not cause for new trial unless it has misled the jury.

Charge of Court. New trial. Before Judge COWART.
City Court of Atlanta. June Term, 1875.

Leake brought complaint against de Saulles & Company on an account for \$699 96, due for services rendered as a clerk, and for \$120 00 money loaned. Defendants pleaded that the account, so far as correct, had been paid. That the plaintiff had been employed by the year and had left their service without cause, thereby damaging them \$250 00. That he was not entitled to any pay for the three dull months of the year. To the plea was attached a bill of particulars made out upon this basis, by which the plaintiff was shown to be indebted to the defendants \$154 65.

In view of the decision the testimony is immaterial here, except as to the item of \$120 00 alleged to have been loaned by plaintiff to defendants. The former testified that it was money loaned. Krous, one of the defendants, stated that it was money taken by him from plaintiff when intoxicated, but he admitted that it was used by defendants with the consent of plaintiff.

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The court charged the jury, amongst other things, as follows: "The proof shows that the plaintiff left defendants about the time of the commencement of the busiest season, which the defendants admit that he served them during the spring months of that year, when, according to the proof, the business was nearly as good as in the fall months, during which time it is admitted plaintiff served.

"As regards the item of \$120 00 there is a conflict of testimony in reference thereto. You will harmonize the testimony if you can; if you cannot, then you will find in favor of that which you believe most clear."

The jury found for the plaintiff \$351 29, with interest from October 15th, 1874. The defendants moved for a new trial because the verdict was contrary to law and evidence, and because of error in the aforesaid charge. The motion was overruled and defendants excepted.

HILLYER & BROTHER, for plaintiffs in error.

A. B. CULBERSON; ORR & LEWIS, for defendant.

BLECKLEY, Judge.

This was a suit by a mercantile clerk against his employers for wages and for money loaned. The money item was admitted. The item for wages was resisted, on the ground that the clerk had withdrawn from the service for which he was hired before the expiration of the term, without just cause and without the consent of his employers. The service commenced in January, 1874, without any definite contract. Subsequently a contract was entered into for service during that year, at the rate of \$1,000 00 per annum. Under that contract the plaintiff remained until the 13th of October, when he withdrew. He justified his withdrawal in two ways: First, he said that it was stipulated in the contract itself that either party might put an end to the engagement at will; and, second, he said that his employers had given him just cause to leave them by refusing to allow him reasonable

for meals, or rather for breakfast. He claimed pay for the time he served, and his suit was brought for a net, after deducting certain admitted payments. Both sides testified in the case. It was a disputed point whether the plaintiff had a right to withdraw at pleasure by the terms of the contract; and it was also a disputed point whether the restriction he complained of in reference to his wages was unusual or unreasonable. It was likewise a question, supposing his withdrawal justified, how his wages for the time he served should be apportioned. Would he be entitled to what his services were worth, irrespective of the contract rate, or would the contract rate govern; and if the latter would the apportionment depend simply on the number of months served out, or partly on the comparative importance of these months as falling in or out of the business season? There was evidence tending to show that some months were more active and some more quiet, and that the fall months especially were business months. Other evidence tended to show that the spring months were nearly equal to those of the fall, and that the plaintiff's services, even in the dull months of winter, were worth the average rate of the contract.

The court charged the jury that the proof showed that the plaintiff left about the commencement of the business season while the defendants admit that he served during the dull months, when, according to the proof, the business was nearly as good as during the fall months. It is not in accordance with the system of charging a jury known to our courts for the judge to express himself thus in reference to the evidence. What the proof shows, and what is according to the proof, must be determined by the jury entirely. The statute prohibits the judge from even intimating an opinion; for this error we are required by the statute itself to order a new trial: Code, section 3248; *Phillips vs. Williams*, 39 *Georgia Reports*, 597.

It is not error for the judge to say to the jury that a fact is admitted: 16 *Georgia Reports*, 368. Of course, it would be otherwise if the fact were not admitted. But where

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there is such a statement in the charge, and there is no contradiction of it by the judge himself in the bill of exceptions, it will be taken as true. In the charge we have just recited, the judge told the jury that the defendants admitted that the plaintiff served during the spring months. Unless it were otherwise alleged in the bill of exceptions, and certified by the judge, we must suppose that this related to some admission made by the defendants in open court. We do not, therefore, include this part of the charge in pronouncing the charge erroneous. The error lies in saying that the proof showed the defendant left about the commencement of the business season, and that, according to the proof, the business was nearly as good in the spring months as during the fall months.

3. The charge is further complained of, as respects the item for loaned money, because the jury were told that the evidence was conflicting, and that if they could not harmonize it, they should find in favor of that which was most clear. Perhaps the judge ought not to say to the jury that the evidence is conflicting; but whether so or not, is of no consequence in the present case—the money item was not disputed except as to the way the loan was made, and that was of no moment. It did not vary the rights of the parties in the least. The evidence to which the charge applied was quite irrelevant to any real issue in the case: 12 *Georgia Reports*, 213.

We will add, that in granting a new trial at all in this case, we carry our obedience to the statutory mandate up to the highest notch. It is more than probable that the defendants were not the least injured by the manner in which the judge instructed the jury; but still, the charge was improper, and we think it best to abide by the words of the statute where there is a possibility that the impropriety may have had the slightest influence on any material point.

Judgment reversed.

MARY E. PRIMROSE, plaintiff in error, vs. JOHN S. BROWNING, defendant in error.

1. In a claim case, the burden of proof is upon the plaintiff in execution to show title in the defendant in order to authorize a verdict that the property is subject; and when the plaintiff seeks to do so by proving that the proceeds of the sale of lands voluntarily conveyed to the wife by the husband, after he became indebted to the plaintiff, paid for the land levied on, though the deed was made by the vendor to the wife, the deeds from husband to wife and from the vendor of the land levied on to the wife, are essential links in the chain which binds the land levied on to pay the plaintiff's debt, and parol evidence of the character or contents of these deeds is inadmissible; the deeds themselves must be introduced or accounted for.
2. When such a deed is introduced, its consideration may be attacked by parol, and though purporting to be valuable, it may be proven to be purely voluntary.
3. An insolvent debtor cannot make a legal voluntary conveyance of lands so as to defeat existing debts, and section 2662 of the Code is applicable to such a case; nor does it matter with what intent the deed be made; the debtor must be just before he can be generous, he must pay what he owes before he can give away. Yet whether he be insolvent or not, is a question for the jury, and that question being in dispute and dependent on the facts proven, it is error in the court to charge that "no debtor in the condition of Primrose could make such a gift of his property."
4. An accommodation indorser becomes a debtor at the time he puts his name on the note, and not from the time that the note matures; and if in this case he made the deed of gift to his wife after the indorsement, and then owed more than he owned, he was insolvent; and the deed to his wife, if voluntary, was injurious to the holder of the note and void against him as an existing creditor.

Claim. Evidence. Deeds. Debtor and creditor. Charge of Court. Indorsement. Fraudulent conveyance. Before Judge TOMPKINS. Richmond Superior Court. October Term, 1875.

Reported in the opinion.

H. CLAY FOSTER, for plaintiff in error.

BARNES & CUMMING, for defendant.

JACKSON, Judge.

Browning obtained judgment against P. H. Primrose as indorser, upon a note dated November 12th, 1873, and payable thirty days after date; execution was issued thereon, and was levied upon certain land as the property of said defendant; the land was claimed by Mary E. Primrose, and on the trial of the claim case it was agreed between counsel that the note became due five days after the date of the deed under which claimant claimed the land.

The plaintiff in execution proved by the defendant, who was the husband of the claimant, that his wife had no separate property prior to his conveying it to her; that he conveyed to her the old homestead place near Harrisburg, and that this property levied on was bought by her from proceeds of the sale of that homestead; that after making a deed to his wife, he had \$7,000 00 or \$8,000 00 in property, and owed \$10,000 00 or \$12,000 00; that he had \$2,000 00 or \$3,000 00 in cash in his butchering business; that he made the deed not to delay or defraud creditors, but to secure a homestead to his family.

At the close of this testimony claimant moved for a non-suit, the court refused the motion, the jury found the property subject, and the claimant moved for a new trial on the following grounds:

1st. Because the court erred in permitting the defendant, Primrose, to testify over claimant's objection, that he made a voluntary conveyance of the homestead to claimant, and that the property levied on was bought with the proceeds of that place.

2d. Because the court erred in refusing the non-suit.

3d. Because he erred in charging that if defendant, Primrose, was insolvent the deed was void, and that he was insolvent if he owed more than he owned.

4th. Because he erred in refusing to charge that if Primrose was an accommodation indorser of O'Dowd & Company he was not the debtor of plaintiff until the note matured.

ATLANTA, JANUARY TERM, 1876.

Primrose vs. Browning.

5th. Because the court erred in applying section 2662

Code to this case, and in remarking thereon that no debt in the condition of Primrose could make such a gift of property.

5th. Because the court erred in charging that if the jury believed the testimony given in the case that the deed was void after signing the note, the deed was void.

7th. Because the verdict was contrary to law and to justice.

The court overruled the motion on all the grounds, and thus the error assigned.

1, 2. We think that the motion for a new trial should have been granted, because the court erred in allowing the defendant, Primrose, to testify in respect to the character of the conveyance which he had made to his wife. The deed itself is the best evidence of what it contained, and it should have been produced or its absence properly accounted for. The plaintiff in execution sought to subject this property; he did not show possession in the defendant nor any legal title in him. He sought to show title in him by showing a deed to his wife coupled with the fact that his own money, or the proceeds of land of his which was subject to this debt, paid for this land, and, thereby, a trust resulted to him, and the title, so far as this debt was concerned, was in him. To show this, an essential link was this deed and its character, whether voluntary or for value; and the best evidence of its contents, of what the consideration purported to be, was unquestionably the deed itself.

In regard to the 5th ground, we think section 2662 of the Code did apply to the case, but that the court went too far in saying that no debtor in the condition of Primrose could make such a gift of his property, for whether Primrose was solvent or insolvent was a question for the jury, and the court should not have taken upon himself to decide it. In respect to the 7th ground, we think that the court also assumed facts which it was the province of the jury to pass upon. Inasmuch as there was no legal evidence of the deed to

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his wife, by which the plaintiff sought to show title in the defendant, we think there was not sufficient evidence to subject this land to this execution, and, therefore, that the new trial should have been granted on the grounds that the nonsuit was refused, and that the verdict was contrary to law. We see no error in the third and fourth grounds. If defendant was insolvent he could not give away his property, and he was insolvent if he owed more than he owned. His indebtedness was incurred at the moment he indorsed this paper, and not when it matured. In view of the entire case, disclosed in the record, we think there should be a new trial. If, on that trial, it should be made to appear to the satisfaction of the jury, by competent evidence, that the defendant in execution indorsed this paper before he made the deed, if voluntary, to the homestead place to his wife, that at that time he owed more money than he had property left to pay it, and that the proceeds of the sale of this homestead place was used by the claimant to purchase the property levied on, the conveyances to both places being in evidence before the jury, then we think there would be sufficient evidence to support a verdict finding the property subject. As the case now stands we do not think that there is enough legal evidence. The court assumed facts which should have been left to the jury to find. We do not mean to say that if the deed to the homestead place should purport to be for a valuable consideration, that such consideration could not be attacked by parol and shown to be purely voluntary; but it would require stronger evidence to change the character of the considerations expressed in the deed.

Let the judgment be reversed and a new trial be granted.

JAMES PARKER, plaintiff in error, *vs.* **MARTIN G. BRADY**, defendant in error.

1. Defendant in attachment does not waive his traverse to the plaintiff's affidavit by afterwards pleading to the merits of the action. The two de-

senses are perfectly consistent, the former going to the writ and the latter to the declaration.

2. While the traverse is not to delay the plaintiff after he has served the defendant personally with notice, it should be tried either before or with the main case, unless continued for cause when the main case is ready.

Attachment. Pleadings. Waiver. Practice in the Superior Court. Before Judge CLARK. Sumter Superior Court. October Term, 1875.

Reported in the opinion.

JOHN R. WORRILL, for plaintiff in error.

GUERRY & SON; HAWKINS & HAWKINS, for defendant.

BLECKLEY, Judge.

Attachment issued in November, 1856, and was levied upon land, personal property, and by service of garnishment. Declaration was filed at the first term, and at the same term the defendant traversed the truth of the plaintiff's affidavit in relation to the ground of the attachment, which ground was that the defendant absconds. In April, 1869, the defendant filed a plea, on oath, to the merits of the action.

At October term, 1875, the cause came on for trial before a jury. The defendant offered evidence in support of his traverse of the plaintiff's affidavit. The evidence was repelled by the court, the court holding that the traverse was waived by pleading to the merits. The defendant then withdrew his plea to the merits and again offered the evidence, and it was again repelled by the court, the court holding that the traverse stood waived as well after the plea was withdrawn as before. The court then, upon inspection of the notes declared upon, rendered judgment, without the verdict of a jury, in favor of the plaintiff, for principal, interest and costs, reciting in the judgment that the plea having been withdrawn, there was no issuable defense filed on oath. The judgment contained a direction for levying, first upon the lands embraced in the attachment levy, and then upon the

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property of the defendant generally. It made no reference to the personal property seized under the attachment.

There is in the record no evidence that the property was replevied, or that written notice of the attachment, or of the proceedings thereon, had ever been served on the defendant.

The Code provides, and the same, in substance, was stated in the law at the date of this attachment, that at the return of the attachment, the defendant may traverse the truth of the plaintiff's affidavit in relation to the ground upon which the attachment issued; that the issue formed upon such traverse shall be tried by a jury at the same term, unless good cause is shown for a continuance; and that if the verdict upon that issue be for the defendant, the attachment shall be dismissed at the cost of the plaintiff; Code, section 3312. The next section declares that the traverse shall not delay judgment on the declaration where personal service has been perfected, but that judgment may be had thereon, subject to the rules of the common law, as well before the trial of the issue on the traverse as afterward. The personal service here referred to is that provided for in section 3309, which is by notice in writing, to be served personally on the defendant by the sheriff, his deputy, or a constable, a copy of which is to be given to the defendant at least ten days before final judgment on the attachment, and the original, with the officer's entry thereon, is to be returned to the court. This being done, the judgment rendered upon the attachment is to have the same force and effect as judgments rendered at common law. The declaration is not to be dismissed because the attachment may have been dismissed or discontinued, but judgment upon the merits of the case is to be rendered on the declaration as in other cases at common law: Code, section 3309. Section 332 declares that when the defendant has replevied the property or when he has appeared by himself or his attorney at law and made defense, or when he has been duly cited to appear by the written notice before mentioned, the judgment against him shall bind all his property, and have the same force and effect as when there has been personal service, and that

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Stinson vs. Thornton.

Report unnecessary.

WOFFORD & MILNER, for plaintiff in error.

A. JOHNSON ; D. A. WALKER, for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiff against the defendant to recover damages for personal injuries sustained by him, as an employee, whilst the defendant's road was in the hands of a receiver appointed by a court of chancery. The defendant demurred to the plaintiff's declaration and made a motion to dismiss it, which demurrer and motion were sustained by the court, and the plaintiff excepted.

This case comes within the ruling of this court in *Henderson vs. Walker et al.*, 55 *Georgia Reports*, 481, and is controlled by it.

Let the judgment of the court below be affirmed.

ONE M. STINSON, by next friend, plaintiff in error, vs.
JOHN P. THORNTON, administrator, defendant in error.

Bona fide purchaser of railroad stock for value and without notice, protected: *Nutting vs. Thomason*, 46 *Georgia Reports*, 34.
The person who acted in procuring the transfers to be made on the books of the corporation, was not an agent of the second purchaser, and the latter was not affected by notice to him not communicated.

es. Railroad stock. Notice. Principal and agent. Be-
udge BUCHANAN. Troup Superior Court. November
1875.

M. Stinson, by her next friend, brought complaint
John P. Thornton, as administrator upon the estate of
J. Thornton, deceased, for fourteen shares of stock in
the Atlanta and West Point Railroad Company, of the value
\$100, with certain dividends which had been declared
vi. 25.

Thurman *vs.* The Cherokee Railroad Company.

judgment only. And this is right. A plaintiff who falsely alleges a ground of attachment when there is none in fact, should lose the benefit of his levy. A lien acquired by perjury, or even by an honest mistake in the affidavit, should last no longer than till the truth is ascertained. The law is quite liberal enough when it allows the plaintiff, after a false commencement, to obtain a general judgment. When an attachment is dismissed its lien is lost: 53 *Georgia Reports*, 442; *Bruce vs. Conyers*, 54 *Georgia Reports*, 678.

The fourth head-note in *Poole vs. Perdue*, 44 *Georgia Reports*, 454, which says that "objections to the form of the affidavit in an attachment are waived by the appearance of the defendant and pleading to the merits," should be construed with reference to the facts of that case, and not extended beyond them. There the objections were not taken or filed until after pleading. Besides, *some* of the objections urged to the affidavit were considered and ruled upon separately by this court, as if not intended to be classed with those to which the fourth head-note applies; which latter are "objections to the *form* of the affidavit." In the present case the traverse went to the ground of the attachment—to the *truth* of the affidavit and not to the *form* of it. Moreover, the traverse was filed at the time prescribed by the statute. It was not after, but long before, any plea to the merits of the action.

Judgment reversed.

JAMES C. THURMAN, plaintiff in error, *vs.* THE CHEROKEE RAILROAD COMPANY, defendant in error.

An employee of a railroad company cannot maintain an action against said company for a personal injury sustained by him while the road was in the hands of a receiver.

Railroads. Receiver. Before Judge McCUTCHEN. Bar-tow Superior Court. July Term, 1875.

Stinson vs. Thornton.

Report unnecessary.

WOFFORD & MILNER, for plaintiff in error.

A. JOHNSON ; D. A. WALKER, for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiff against the defendant to recover damages for personal injuries sustained by him, as an employee, whilst the defendant's road was in the hands of a receiver appointed by a court of chancery. The defendant demurred to the plaintiff's declaration and made a motion to dismiss it, which demurrer and motion were sustained by the court, and the plaintiff excepted.

This case comes within the ruling of this court in *Henderson vs. Walker et al.*, 55 *Georgia Reports*, 481, and is controlled by it.

Let the judgment of the court below be affirmed.

JANE M. STINSON, by next friend, plaintiff in error, vs.
JOHN P. THORNTON, administrator, defendant in error.

1. *Bona fide* purchaser of railroad stock for value and without notice, protected: *Nutting vs. Thomason*, 46 *Georgia Reports*, 34.
2. The person who acted in procuring the transfers to be made on the books of the corporation, was not an agent of the second purchaser, and the latter was not affected by notice to him not communicated.

Sales. Railroad stock. Notice. Principal and agent. Before Judge BUCHANAN. Troup Superior Court. November Term, 1875.

Jane M. Stinson, by her next friend^b, brought complaint against John P. Thornton, as administrator upon the estate of Thomas J. Thornton, deceased, for fourteen shares of stock in the Atlanta and West Point Railroad Company, of the value of \$1,400 00, with certain dividends which had been declared

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thereon. The defendant pleaded the general issue, and further, that if his intestate had ever purchased any such stock he was unaware of the fact that plaintiff had any interest therein; that he purchased from one authorized to sell, and paid full value therefor.

The case made by the plaintiff was, in brief, as follows :

John Stinson, by his will, left twenty-one shares of stock in the Atlanta and West Point Railroad Company to his daughter, the plaintiff, who was imbecile and incapable of attending to business. He appointed his son, John W. Stinson, his executor, with full power to sell any part of the estate when he might think it best for the widow and children.

The stock book of the railroad company showed that on July 25th, 1860, the twenty-one shares standing in the name of John Stinson were transferred to John W. Stinson, trustee for Jane M. Stinson; that on January 18th, 1868, fourteen shares were transferred to Wise & Douglass, and that on the same day these shares were further transferred to Thomas J. Thornton.

About January 18th, 1868, John W. Stinson was indebted to Wise & Douglass on an account for himself and for goods purchased by him for the use of the family of testator. He offered to let Wise & Douglass have the above mentioned stock if they would take it at ninety-five cents in the dollar. They inquired as to what they could sell it for. Thomas J. Thornton agreed to give ninety-four cents. They accordingly purchased from Stinson at ninety-five cents and sold to Thornton at ninety-four. The papers were given by Wise & Douglass to John F. Moreland to have the transfers made. They did not know themselves how the stock was held; did not tell Thornton that it was the property of an estate; merely said to him that they had some railroad stock which they wished to sell. It was left to Moreland to have the transfers properly made. The money paid by Thornton was appropriated first to satisfaction of account against Stinson, and balance handed to Bigham by order of the former.

Plaintiff, having further proved the number and amounts of dividends declared on the stock since the transfer by Stinson, closed.

On motion of defendant a non-suit was ordered, and plaintiff excepted.

B. H. BIGHAM, for plaintiff in error.

SPEER & SPEER, for defendant.

BLECKLEY, Judge.

The two points ruled by the court appear, at sufficient length, in the head-notes. They need not be commented upon.

Judgment affirmed.

THOMAS G. LAWSON, administrator, plaintiff in error, vs.
ALFRED H. COATES, defendant in error.

1. A memorandum on an account and application for a mechanic's lien, not recorded with the lien, and with no proof in regard to the person who made the memorandum, or of its truth, is no evidence at all.
2. When the verdict of the jury has no legal evidence to sustain it, a new trial must be granted.

Mechanic's lien. Evidence. New trial. Before Judge BARTLETT. Putnam Superior Court. September Term, 1875.

Reported in the opinion.

THOMAS G. LAWSON, for plaintiff in error.

W. F. JENKINS, for defendant.

JACKSON, Judge.

This was a suit on a note secured by a mechanic's lien. The jury found for the plaintiff; the defendant moved for a

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new trial; the court set aside the verdict and granted the new trial so far as respects the finding in favor of the validity of the lien; the plaintiff excepted, and assigns for error the grant of this new trial.

1. The single question is, was the lien recorded in thirty days? The only proof that it was so recorded was a memorandum on what was said to be the original account and application or claim for lien, to the effect that the work was completed on the 20th of November, 1874, but there was no proof on the point who put the memorandum there; the memorandum was not on the record; Leonard, the builder, could not say that he put it there, and stated that the work was finished on 25th of September, except one room which was worked on by one carpenter a week or ten days after that time; the note for the work was due the 1st of November, 1874; the lien was not recorded until the 17th of December; and really it seems to us that there was no legal evidence at all that the lien was recorded in thirty days, as the law at its date required.

2. The court, therefore, was compelled to grant the new trial on the ground that there was no evidence to support the verdict.

Judgment affirmed.

WALTON WHITAKER, plaintiff in error, *vs.* JAMES A. DYE,
defendant in error.

A promise to pay in currency by a future day, a sum equal to the value of a given amount of currency at the date of the promise, is to be discharged, after maturity, with no less currency than at maturity. Such a contract gives to the debtor the benefit of appreciation up to the expiration of the credit, but not of that which occurs after default in payment.

Promissory notes. Contracts. Before Judge BUCHANAN.
Troup Superior Court. November Adjourned Term, 1874.

Reported in the opinion.

W. O. TUGGLE, by ALBERT H. COX, for plaintiff in error.

FERRELL & LONGLEY, for defendant.

BLECKLEY, Judge.

When the contract was made gold was \$1 38; when it became due, it was \$1 20 $\frac{1}{4}$; it was the same at the date of the first credit, and at the date of the second credit it was \$1 09. At the time of the trial (December 10th, 1874,) it was \$1 11 $\frac{1}{2}$. The instrument declared upon was as follows:

\$3,530 00. By the 25th December, 1869, I promise to pay M. P. Dye bearer, thirty-five hundred and thirty dollars, for value received. This note has the following condition: the subscriber agrees to pay at the maturity of this note, in the currency then in circulation, an amount equivalent to the par value of the currency now in circulation, as it is valued at the date hereof. This October 12th, 1868.

(Signed)

"WALTER WHITAKER."

Indorsed upon the same were these entries:

On the 12th of October, 1868, gold was quoted in New York, at \$1 38; the gold value of this note would have been \$2,558 70. Received on this note one thousand dollars in currency, which is worth in gold, according to New York quotations, \$1 20 $\frac{1}{4}$, which is \$831 60 in gold, December 1, 1869.

Received on within note nine hundred dollars in currency, April 28th, 1870.

The court below was called upon to construe the contract without aid from extrinsic testimony, and to give the jury a rule for calculating the amount for which the verdict should be rendered, the value of gold as compared with currency being as above set forth.

The plaintiff contended that the amount of currency which the defendant undertook to pay became fixed and certain when the contract matured, and that subsequent appreciation of gold should not reduce the debt to any less amount. He arrived at the sum thus: \$3,530 00 in currency at the date of contract, when gold was \$1 38, equaled \$2,558 70 gold; and this, at

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date of maturity, when gold was \$1 20 $\frac{1}{2}$, equaled \$3,134 40 currency. The contract being an agreement to pay *currency*, this last sum was what should have been paid on the day of maturity, and was therefore the real amount of the debt.

On the other hand, the defendant contended that the value, and not the amount of currency, was the substantial matter in the contemplation of the parties. What the creditor was to receive was the equivalent of \$3,530 00 currency at the date of the contract, which reduced to gold, the ordinary standard of value, was \$2,558 70. This sum in gold was the real debt, and so remained. It was the debt at the date of the contract, at the time of maturity, and, (with the gold value of the two credits deducted, and interest added,) at the time of the trial. As tending to confirm this theory of the case, the defendant insisted that the parties themselves had recognized it and acted upon it in entering the first credit, since, in that entry, they recorded the gold value of the note and the gold equivalent of the credit.

At the date of the contract and down to the time of trial, one species of currency was a legal tender; and we know by the public history of the country, and there is no evidence to the contrary in the record, that the whole mass of currency in circulation was at par with it. Under these circumstances, a promise to pay "in currency in circulation," may be considered, in its ultimate analysis, a promise to pay in the currency tender, as distinguished from the specie tender. As there was a mixed currency of equal commercial value in circulation when the debt matured, some of which was money, and some not money, the most favorable view that can be taken for the debtor is, that when he failed to exercise his privilege of paying in that which was not money, the debt at once became payable absolutely in that which was money. If he was not bound at first to pay legal tender currency to the exclusion of the other, he became so bound on the day of maturity by his failure to pay any.

On breach of a contract to pay currency, the measure of recovery is, generally, the value of the currency at the time.

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of the breach, with interest added: 8 Peters, 181; 12 Ill., 184; 3 Litt., 245; 2 S. & M., 485. How ought this rule to be applied when the recovery is not to be in gold or silver, but in some of that very currency which ought to have been paid? Should the value be estimated in one kind of money and the judgment go for another kind, or should the measure of the recovery and the recovery itself be in the same medium? If this were a gold contract, the judgment should be for gold: 7 Wall., 229; 12 *Ibid.*, 687. But it is a currency contract, and whatever advantages belong to it, as such, ought to be preserved. In dealing with it, the value of gold was involved to find out how much currency was due, but for that purpose only. When the translation into currency was once made, the medium was reached in which, according to the contract, the debt was to be paid, and in which, according to the law, the judgment might be rendered. Should there be a re-translation into gold for the purpose of adjusting the recovery in currency to the damages sustained by not paying the like currency? Treating currency as represented by that part of it which may be used as legal tender, is not the difference between realizing it earlier or later, simply the lawful interest; no more and no less? We shall so hold in the present case, and affirm the judgment. •

CARHART & BROTHER, plaintiffs in error, vs. E. C. GRIER,
defendant in error.

Where property offered for sale by the sheriff was withdrawn on the promise of the defendant that he would pay off the execution levied thereon, and this payment was in fact made, the money in the hands of the sheriff is not subject to an older execution against such defendant.

Money rule. Levy and sale. Executions. Before Judge WRIGHT. Mitchell Superior Court. November Term, 1875.

Reported in the decision.

WARREN & HOBBS, for plaintiffs in error.

No appearance for defendant.

WARNER, Chief Justice.

This was a motion for the distribution of money on the following agreed statement of facts: That on the first Tuesday in July last, a lot of land which had been levied on as the property of defendant, by a *fi. fa.* in favor of Grier, was offered for sale by the sheriff, when it was withdrawn from sale on the promise of the defendant that he would pay off the *fi. fa.* levied thereon, which he did pay to the sheriff; but before the sheriff paid the money over to the plaintiff in *fi. fa.*, Grier, another *fi. fa.* in favor of Carhart & Brother against Butler, the defendant, of older date, was placed in the hands of the sheriff with notice to hold up the money and not pay it to Grier. The court ordered the money to be paid to the Grier *fi. fa.*, whereupon the plaintiffs in the Carhart *fi. fa.* excepted.

The money in the sheriff's hands was not raised by the sale of the defendant's property, but was a voluntary payment by the defendant of the Grier *fi. fa.*, which he had the right to do, and it was the duty of the sheriff to have entered that payment on that *fi. fa.* in satisfaction thereof, there being no other *fi. fa.* in his hands at that time. Grier became entitled to the money when it was voluntarily paid by the defendant in satisfaction of his *fi. fa.*, and the fact that an older *fi. fa.* against the defendant was afterwards placed in the sheriff's hands did not deprive Grier of his right to the money which the defendant had voluntarily paid in satisfaction of his *fi. fa.* If the money in the hands of the sheriff had been raised by a sale of the defendant's property that would have presented a different question. There is nothing to prevent the plaintiffs in the older *fi. fa.* from levying it on the defendant's property and making their money, so far as the record shows.

Let the judgment of the court below be affirmed.

JAMES WHITE, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

1. Under the Code (sections 4507, 4508,) only public officers, either *de jure* or *de facto*, can be convicted of extortion.
2. For an officer having in his hands a warrant for assault and battery, to receive money which is voluntarily offered and paid by the defendant, is not extortion, if the money is received in good faith to be used in settling the prosecution and not for the officer's own use. Whatever offense the transaction may amount to, it is not extortion.
3. That the officer said the warrant was for assault and battery, is not irrelevant, and may be proved against him, as part of the *res gestæ*, without producing the warrant.
4. In order to throw light upon the question of guilty intention, the officer's experience and acquaintance with his duties may be shown; and for this purpose, though it be alleged that he was a special constable, it may be proved that he had frequently before been sent by the magistrate to make arrests. And parol evidence to that effect is not secondary.
5. The judge may propound a leading question to a witness introduced by the state.
6. It is error to charge, "Under the evidence for the defense, he is guilty."
7. It is error to charge, "If you disbelieve all the evidence for the state, and believe every word of evidence for the defense, I charge you the prisoner is guilty, but of course you can look to all the evidence and make up your verdict on it."

Criminal law. Extortion. Officers. *Res gestæ*. Evidence. Witness. Charge of court. Before Judge TOMPKINS. Chatham Superior Court. May Term, 1875.

An indictment was found against White for the offense of extortion, whilst acting as a special constable, in the execution of a warrant for assault and battery against one William Sheppard. He pleaded not guilty.

The evidence for the prosecution showed that the defendant stated to Sheppard that he had a warrant for him; that thereupon the latter asked if the case could be settled and how much it would take; that defendant replied it could be settled for \$10 00; that on the succeeding day one Henry Haas paid to defendant \$10 00; that defendant stated to Sheppard that he would have to give bond for his appearance; that he went to the office of the justice of the peace

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for that purpose and gave the bond; that defendant acts as constable for the justice.

The evidence for the defense was, in substance, as follows:

Isaac Russell, justice of the peace, sworn: Issued the warrant against Sheppard and swore in A. Fredericks as a special constable; told him to take defendant to aid in making the arrest. Subsequently defendant and Sheppard came to his office. The former stated that he had received \$10 00 for the purpose of settling the case. Told him that it could not be done without the consent of prosecutrix and the payment of all costs, and that \$10 00 was not sufficient. Witness instructed defendant to return the \$10 00. A few moments after this, in the presence of Sheppard, defendant told witness that he had returned the money. Sheppard then wanted to know if the case could be settled. Replied that under instructions from the judge of the city court and the solicitor general, witness was authorized, upon the consent of the prosecutrix and the payment of all costs, to settle misdemeanor. He then asked if he could go to an attorney's office to have a bond for his appearance at a court of inquiry drawn, so that, in the meantime, the consent of the prosecutrix to the proposed settlement could be obtained. Witness permitted him to go and the bond was executed, Haas signed it. On the day of the examination the prosecutrix and Sheppard agreed to settle and pay the costs. Haas stated that he had given \$10 00 to defendant to settle the case. Witness replied that defendant had received the \$10 00 under the impression that the case could be settled, but upon being informed that this could only be effected by the consent of the prosecutrix and the payment of all costs, which were more than \$10 00, he had, under instructions from witness, returned the money to Sheppard. Defendant was not sworn in to execute this warrant. Fredericks was. Did not see defendant return the \$10 00, but in the presence of Sheppard he stated that he had returned it and Sheppard did not deny it. Has frequently sworn in defendant in cases of emergency.

William Whitfield testified that he was present at the cor

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versation between defendant and Russell, justice of the
That he saw defendant give Sheppard the \$10 00.

William Hall testified that he went to Russell's office
give bond for Sheppard, and was informed that the money
had been returned and that Sheppard had gone to an attorney
to have his bond drawn.

R. Wayne Russell testified that he drew the bond; that
Sheppard came to his office with defendant; that he charged
him \$10 00; that defendant wished him, if necessary, to defend
him in the city court; that he told him he would have to
pay an additional fee; that he replied he had only \$10 00
which he had borrowed from Haas; that he was positive
Sheppard paid him the \$10 00; that the latter pleaded guilty
to assault and battery in the city court.

In rebuttal, Sheppard testified that defendant did not return
the \$10 00, and that he did not pay it to R. Wayne Russell.

Haas testified that he demanded the \$10 00 from defendant,
who refused to return it, saying it had been paid to R.
Wayne Russell for drawing the bond.

The statement of the defendant presented, in substance, the
case made by his witnesses.

The jury found the defendant guilty. A motion for a new
trial was made on the following grounds, to-wit:

1st. Because the verdict was without evidence to support
it and contrary to law.

2d. Because the court, upon its own motion, asked the witness,
Haas, the following question: "Did the prisoner come to you
as a public officer and ask for costs?" the defendant
objecting thereto upon the ground that it was leading.

3d. Because the court, upon its own motion, asked the witness,
William Sheppard, the following questions: "Did he tell you
who had you arrested?" "Did he tell you what the warrant
was for?" To which the witness answered, "Did not say who
had me arrested, but did say that the warrant was for assault
and battery." To this question the defendant objected,
because it was leading and the answer necessarily secondary
evidence.

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4th. Because the court permitted the solicitor general to propound the following question to the witness, Isaac Russell: "Have you not frequently sent the defendant out to make arrests?" This question was objected to upon the ground that as the defendant was alleged to have been a special constable the question was irrelevant and the answer secondary.

5th. Because the court refused to give the following charges to the jury:

"1st. If the thing alleged to have been taken was given voluntarily, then it was not unlawful.

"2d. If the \$10 00, which it is alleged was extracted from William Sheppard, was voluntarily paid by Henry Haas to the defendant for and on account of Sheppard, then the defendant is not guilty of extortion.

"3d. Extortion only proceeds from a corrupt heart."

6th. Because the court charged the jury as follows: "If you disbelieve all the evidence for the state, and believe every word of evidence for the defense, I charge you that the defendant is guilty. But of course you can look to all the evidence and make up your verdict on it. It is unlawful for a constable to make a settlement; if he took the \$10 00 saying that he would settle the case for such payment, it was unlawful, no matter where the proposition for a settlement came from. If he took the money it was unlawful as he had no right to settle cases between parties. Under the evidence for the defense he is guilty."

The motion was overruled and the defendant excepted.

MELDRIM & ADAMS, by G. A. HOWELL, for plaintiff in error.

A. R. LAMAR, solicitor general, by W. G. CHARLTON, for the state.

BLECKLEY, Judge.

1. The head-notes rule the law of this case, as we understand it. If the defendant was an officer *de jure* or *de facto* he could commit extortion; but not if he was a mere guard

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or constable's attendant. The test of whether he was an officer or not is, whether he was in a situation to make a legal arrest on that particular warrant in the absence and without the co-operation of Fredericks, the sworn special constable. That is a question partly of law and partly of fact; and the court should have so dealt with it.

2. Even if he was an officer, the transaction was not extortion if he took the money in good faith, without any claim to it, and with a *bona fide* purpose to use it in accordance with Sheppard's wish, in settling the prosecution. The reception of the money may have been improper for such a purpose, but even if it was criminal, the offense committed was not extortion. In demanding his own costs, or those which he is authorized by law to collect for other officers, the collecting officer (especially if negligent in the use of means to inform himself,) might not be excused by an honest mistake, for an excessive or illegal demand and collection; but to accept money as a sort of agent for the party voluntarily paying it, and agreeing to use it in settling a pending or threatened prosecution, is quite another matter. In the one case there is an official claim of right; in the other, none. It is not, however, absolutely requisite that the element of costs should be in contemplation in order to constitute extortion. If a ministerial officer should use his authority, or any process of law in his hands, for the purpose of awing or seducing any person into paying him a bribe, that would, doubtless, be extortion. So, in the present case, if the money was taken as a bribe, and the defendant was an officer, he would be guilty. In this aspect of the matter, the purpose and good faith of the defendant are of the utmost importance. Was the transaction corrupt? or was it simply improper or technically illegal, as contravening the letter and policy of the law applicable to the open and honest settlement of prosecutions? Was it in fact a kind of agency on the part of the officer to use the money in some open way to get the prosecution settled, or was that a mere pretext—a bribe to the officer being at the bottom—and this pretext merely glossing it over?

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3, 4, 5, 6, 7. The other points are left to stand upon the statement of them in the head-notes.

Judgment reversed.

SAMUEL H. BLACKWELL, plaintiff in error, *vs.* JOHN A. BROUGHTON *et al.*, defendants in error.

1. An application for a homestead, alleging that the applicant is the head of a family consisting of his indigent daughter and her children, dependent upon him, is not demurrable on general demurrer and should not be dismissed; if the allegation be not clear that the daughter was a widow, it was amendable, and on special demurrer it could have been so amended.
2. It was decided in *Marsh vs. Lazenby*, 41 Georgia Reports, 153, that the head of a family consisting of a mother and sisters was entitled to a homestead; the principle there decided covers, in reason and spirit, this case.
3. On such an application the true issue is whether the applicant was *bona fide* the head of such a family, whether this widowed daughter was legitimately and honestly, and without regard to this debt, a member of his family, or was fraudulently made a member thereof to avoid the payment of the debts of the applicant; if the former, he is entitled to his homestead; if the latter, he is not; and this issue is for the jury on the appeal from the ordinary.

Homestead. Demurrer. Before Judge BARTLETT. Jasper Superior Court. October Term, 1875.

Reported in the opinion.

KEY & PRESTON, by JACKSON & LUMPKIN, for plaintiff in error.

C. L. BARTLETT; F. & C. W. JORDAN, for defendant.

JACKSON, Judge.

1. This was an application for a homestead which came up on appeal from the ordinary to the superior court of the county of Jasper. The applicant alleged that he was the head of a family, that the family consisted of "his adult daughter, Nannie A. Bowdin and her three minor children, who are in in-

indigent circumstances and dependent upon him for a support; are members of his family and living in his household; have no property and are unable to support themselves by reason of physical inability." The application containing this allegation was dismissed on general demurrer, the applicant excepted, and the naked question is this: Is a father who has his adult daughter and her three children, all totally dependent upon him for a support, living with him in his house, the head of such a family as, in the sense of the constitution of 1868, entitles him to a homestead? It will be observed that it is not alleged that the daughter is a widow, but she bears a different name from the father, has no property, is entirely dependent on him for support, and the inference is very strong that she is a widow. If she is not, and this were the ground of demurrer, it should have been demurred to *specially*, and if consistently with the truth it could have been done, the defect was curable by amendment. We assume then, that she is a widow, and consider this the question: Is a father, who has living in his house with him a widowed daughter and her infant children, entitled to a homestead?

2. It was unanimously ruled by this court in *Marsh vs. Lazenby*, 41 *Georgia Reports*, 153, that the unmarried head of a family, consisting of his mother and sisters, was entitled to a homestead. We think that case, in principle, covers this. It would be difficult to show to any rational mind and sound judgment, that a man is under greater obligation to support in his house, his mother than his daughter, and whilst the tie between brother and sister is close, that between parent and grand-children is still closer. It is true, that *Marsh vs. Lazenby* is put mainly upon the obligation to support the mother, yet the head-note and the facts show that the sisters were also included in the family of which the brother was the head; nor does it appear in that case that the mother or sisters were unable to maintain themselves. In the case at bar, it does appear that they are indigent, incapable of work from physical inability, and wholly dependent upon the head of the family. In so far as a daughter is as near to one's heart as

is mother, and grand-children nearer than sisters, and those destitute of property and unable to work, more appropriately within the beneficent principle on which the constitution provides a homestead, this case is stronger than *Marsh vs. Luenby*. If the family in whose behalf a homestead can be set apart must consist of those whom the head is under the strictly legal obligation to support, the father is as much bound to maintain in his house his daughter, as his mother; the former is more naturally a member of his household where she was born, than the latter, who raised him under a different roof-tree, that of his father, and only on the death of her husband, lived with the son. The whole court is of opinion that the case cited covers this, and our judgment is unanimous.

3. Of course the applicant must be the *bona fide* head of this family; that is to say, it must appear to the satisfaction of the jury, on the trial, that the daughter and her children were legitimately members of the family, had been so long enough and under circumstances to show that they were not brought into the household of the applicant on purpose to avoid the payment of debts, but in good faith and honestly were members of the family.

For myself, independently of the case in 41st Georgia Reports, I think daughters of any age living with the father *bona fide* in his house, or little grand-children living there, and dependent upon the grand-father, whether the mother be living or dead, would constitute a family in the sense and spirit, in the true intent and meaning of the constitution of 1868; and such a head of such a family, *bona fide* constituted, and not gathered for the moment to defraud creditors as a mere trick or sham, would be entitled to his homestead. In the meaning of the constitution, it might well, I think, be held that children included grand-children, and if they live with the grand-father and were dependent upon him, they would be as much his family as his own children. Nor do I think that the framers of the constitution meant to break a man's family just as soon as his wife died and his children became of age. If they had all left him, their voluntary

parture would have broken it up; if they remained with him, especially daughters dependent upon him as much when twenty-one as when twenty, they would still be, in the sense of the constitution, a legitimate and component part of his family, and he would be entitled in law to a home for himself as their head, and for them as his household.

Let the judgment be reversed.

WILLIAM R. PHILLIPS, plaintiff in error, *vs.* H. K. THURBER & COMPANY, defendants in error.

1. If a garnishee, without objecting to the jurisdiction, submits to answer out of the county of his residence, and within that where his creditor, the debtor in the principal case, resides and is sued, neither the latter, nor a claimant of the fund who has dissolved the garnishment by giving bond and security under the act of 1871, (Code, section 3541,) can urge the garnishee's non-residence, by plea to the jurisdiction, or otherwise, as a means of defeating the garnishment proceeding.
2. On the trial of a traverse, filed by the claimant, to the garnishee's answer, the issue is between the claimant and the plaintiff; the garnishee is no party to that issue, and his declarations are not admissible evidence for the claimant.
3. Bond of the claimant with condition to be void if he shall pay to the plaintiff the judgment which the plaintiff may recover in the suit, with costs, is in substantial compliance with the statute. Such bond, with approved security, dissolves the garnishment; and judgment may be entered thereon, instant, for the amount admitted in the garnishee's answer to be due from him to the defendant in the principal suit, when there is a general verdict of the jury against the claimant on his traverse of such answer.

Garnishment. Jurisdiction. Evidence. Before Judge HOPKINS. Fulton Superior Court. October Term, 1874.

Reported in the opinion.

THRASHER & THRASHER, by brief, for plaintiff in error.

D. F. & W. R. HAMMOND, for defendants.

BLECKLEY, Judge.

After the service of summons of garnishment, a strange came in, under the act of 1871, (Code, section 3541,) and, a claimant of the fund sought to be reached by the garnishment, filed his bond in substantial compliance with the act. Subsequently the garnishee answered, admitting himself indebted in a specific sum to the defendant in the suit wherein the garnishment issued. The claimant traversed the answer. He also filed a plea to the jurisdiction of the court on the ground that the garnishee was not a resident of the county but of another county. The defendant in the principal case filed a similar plea. Both these pleas were, on motion of the plaintiffs, stricken by the court. The issue formed by the claimant's traverse of the garnishee's answer, was tried, and the jury returned a verdict, generally, in favor of the plaintiffs. Judgment was thereupon entered against the claimant and the sureties on his bond, for the amount admitted in the answer of the garnishee to be due from him to the defendant, his creditor.

1. It was not error to strike the pleas. The garnishee had answered, and thereby waived his privilege of being called to answer only in his own county. He answered in the county where his creditor resided and was sued. He answered to the court in which that suit was pending, and to which the garnishment was returnable. None of the proceedings disclosed the fact that the garnishee was a non-resident, and he took no advantage of that or any other fact to protect himself against the jurisdiction. His non-residence was in no way alleged upon the record until his answer had been on the file some weeks, and then only by the two pleas we are considering. He has made no complaint of the jurisdiction; and we cannot doubt that after he appeared and answered, his non-residence would count for nothing in the subsequent proceedings: Code, section 3461.

2. The garnishee answered that he was indebted to the defendant. The claimant's position was that the garnishee's liability was to him and not to the defendant; for the reason

that the same arose in consequence of the garnishee's having received from the makers of certain negotiable paper, money to pay off said paper, which paper, payable to the defendant and his assigns, had been assigned, before maturity, to the claimant. It was contended that the garnishee was simply the depository of a fund to be paid on this paper; and that, as the claimant held the paper by assignment, the money was due to him and not to the defendant. To support this theory of the case, the claimant, after introducing the paper, offered in evidence certain declarations of the garnishee, made after the service of the garnishment, to the effect that the money was placed in his hands to pay off said paper; that he had no other funds belonging to the defendant; and that, having been garnished, he would hold up the money and let the parties contend for it in court. The court, on objection to this evidence by the plaintiffs, ruled it out. These declarations of the garnishee were not admissible evidence. The Code declares, in section 3542, that the garnishee, upon answering, shall be discharged from all further liability, and the plaintiff's remedy shall be upon the claimant's bond. The garnishee is allowed to answer, but nothing more. He cannot, by his mere verbal statements out of court, affect the rights of either party. There is nothing to prevent him from being examined as a witness; and if the claimant had wanted from him any explanation of the facts and circumstances on which the admissions of the answer were based, that course was open to him. But upon an issue between other parties, and to which the garnishee is no party, his bare sayings are not to be taken. See a somewhat similar question in 52 *Georgia Reports*, 562.

3. There was a motion by claimant in arrest of judgment and to set the judgment aside. In support of these, it is urged that the garnishee's answer was filed after the claimant's bond was given to dissolve the garnishment. But what of that? The statute gives the garnishee the right to answer, but does not prescribe that the answer shall not be filed after the claimant has given bond. But a still more conclusive re-

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ply is, that the claimant took no exceptions to the answer as coming too late; but traversed it, thus tendering an issue upon it, which was accepted by the plaintiffs and tried by the jury. Whether the answer was early or late, the claimant litigated its truth; and not until after the issue was found against him, did he suggest that the answer was out of time.

It is urged, also, that the claimant's bond did not dissolve the garnishment, and that no judgment can be rendered on it for that reason. The condition of the bond is not in the words of the statute, but we think there is a substantial conformity. We find no error in any part of the case.

Judgment affirmed.

JANE MCFARLIN, plaintiff in error, vs. R. M. STINSON *et al.*,
administrators *de bonis non*, defendants in error.

An executor cannot bind the estate of his testator by the execution of a note signed by him "as executor." The assets of such estate are only bound for the debts contracted by the testator during life.

Administrators and executors. Contracts. Before Judge
BUCHANAN. Troup Superior Court. November Term, 1875.

Reported in the decision.

SPEER & SPEER, for plaintiff in error.

B. H. BIGHAM; T. H. WHITAKER, for defendants.

WARNER, Chief Justice.

This was an action brought by the plaintiff against R. S. McFarlin, administrator of John W. Stinson, and W. A. Shackelford, R. M. Stinson, and Neal Wilkinson, administrators *de bonis non* of John Stinson, deceased, and A. L. Stinson, (the plaintiff alleging that N. L. Stinson was dead and no representation on her estate,) on the following described promissory note:

By the first day of January next, we or either of us promise to pay R. S. Farlin or bearer, \$720 00, for value received, and if not punctually paid, to interest at rate of twenty per cent. per annum after maturity, said interest to be paid annually, or considered and counted as principal.

Witness our hands and seals, this 4th day of January, 1874.

[Signed]

"JOHN STINSON,

"N. L. STINSON,

"A. L. STINSON,

"JOHN W. STINSON,

"Executor of estate of John Stinson, deceased."

On the trial of the case, the plaintiff offered and read the note in evidence, and also a copy of the last will and testament of John Stinson, deceased, in which he directed that his wife should keep the Phillips place, where she then lived, as long as she did live, and for her to have everything there that was necessary for her and the children to be comfortable and pleasant. The testator appointed his son, John W. Stinson, his executor; with power to sell any part of the estate when he might think it best for his wife and children. McFarlin, sworn as a witness for plaintiff, stated that when the money was loaned on which the note was given, John W. Stinson stated that it was for the use of the estate; that they had or were putting up a water gin on the place, and that it had cost, or was costing, them a good deal of money. When the testimony for the plaintiff was closed, the defendants' counsel made a motion for a non-suit as to the administrators *de bonis non* on the estate of John Stinson, deceased. The court sustained the motion and the plaintiff excepted.

The only question in the case, therefore, is, whether John W. Stinson, as the executor of John Stinson, deceased, could bind the estate of his testator by the execution of the note loaned on, so as to make the assets thereof liable for its payment? It is undoubtedly true, that the assets of the estate of a deceased testator are liable for the payment of the debts and obligations, contracted by him in his lifetime, but it would be a novel and dangerous doctrine to hold that the assets of a deceased testator could be made liable for the contracts made by his executor after his death; so dangerous to the es-

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of deceased testators, that the law does not allow it to one. An administrator or executor can only bind him- by his contracts; he cannot bind the assets of the de- sed. Therefore, if he make, indorse, or accept, negotiable per, he will be held personally liable even if he adds to his vn name, the name of his office, signing a note, for example "A as executor of B," for this will be deemed only a part in his description, or will be rejected as surplusage: 1st Parsons on Notes and Bills, 161; *Lovelace vs. Smith et al.*, 39 *Georgia Reports*, 130. The executor under the will of the testator in this case, had the power to sell any part of his estate for the purposes therein expressed, but did not have the power or legal authority, to bind the assets of his testator's estate by the execution of the note as set forth in the record. There was no error in granting the non-suit.

Let the judgment of the court below be affirmed.

WYLIE H. DUNCAN, plaintiff in error, vs. JOHN L. ANDERSON, defendant in error.

1. Once granting a new trial by the presiding judge, for want of sufficient evidence to support the verdict, can hardly be said to be abuse of discretion, since the parties have no longer the resource of appealing to a special jury; and affirmance in the supreme court is almost a matter of course.
2. The landlord is not responsible in damages for a tort committed by a cropper in hiring or working servants previously employed by another master. The facts of this case do not make either an original agency or an agency by ratification. The cropper alone had the power of employment and of discharge.

New trial. Landlord and tenant. Tort. Before POTTLE. Wilkes Superior Court. November Term.

Duncan brought complaint against Anderson for damages, alleged to have been sustained by him on the enticing away by the defendant of one Enoc farm hand employed by the plaintiff for the year reason of which his services were lost. The record no plea.

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The evidence made the following case:

In January, 1874, the plaintiff entered into a contract **Huff** by which the latter was to work for him as a farm borer during that year. He was to be paid \$60 00 in **for** his services, and to have every Saturday for his **use**. Huff had been in the employ of the plaintiff for **four** preceding years, and had become indebted to him for **vances** made. He worked until February 12th, and **left** the service of plaintiff and went upon a farm owned **defendant**. He was then indebted to plaintiff \$88 75 for a **vances**. The defendant was farming with one Mat. **Heard** on shares. He was to furnish the land and stock, and **fee** for the latter. **Heard** was to furnish the hands and to **fee** them. The crop was to be equally divided. The defendant **was** to control the half of the crop belonging to **Heard** until he was paid what was due him by any of the hands. **Defendant** was a merchant, and sold to the hands what goods **they** wished, charging to each the purchases made by him. **He** never employed Huff to work for him; **Heard** employed **Huff** in compliance with his contract to furnish hands. **Defendant** did not know that Huff was employed on his place until **Heard** reported him as wanting supplies from the store.

There was evidence to show that defendant knew of the contemplated employment of Huff on his farm before he actually left plaintiff; also as to the damage sustained by the latter. It is omitted as immaterial here.

The jury found for the plaintiff \$200 00. The defendant moved for a new trial, among other grounds, because the verdict was contrary to the law and the evidence. Thereupon the court passed the following order:

"After considering this motion, it is ordered that the verdict be set aside and a new trial granted, on the ground that the brief does not show any evidence that connects the defendant with the hiring of Enoch Huff; nor is there any proof that the wrong done by Mat. Heard was ratified in any manner by defendant. It is clear that he, Mat. Heard, was a cropper, and not the servant of the defendant, and in

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no sense was Huff the servant of Anderson, nor in any way subject to his control."

To this judgment plaintiff excepted.

F. H. COLLEY, for plaintiff in error.

W. M. & M. P. REESE, for defendant.



BLECKLEY, Judge.

1. The judge below granted a new trial because the verdict was unsupported, on a material point, by the evidence. As we ruled during the last term, in the case of *Swell vs. Holland*, 54 *Georgia Reports*, 611, only a very palpable abuse of discretion will be met, in this court, by a judgment of reversal, where the new trial ordered is put upon this ground, and is the first new trial granted in the case. A first verdict which is not satisfactory to the judge who presided at the trial is, presumptively, wrong; and it must be right to a very high degree of certainty for us to restore it after it has been set aside by him. We have no purpose to nullify the law which clothes him with the power to grant new trials for mistakes or misapprehensions of the jury. Since the abolishment of our ancient and excellent system of appeals to a special jury, this power of the circuit judge has acquired increased importance. If it has been borne down hitherto, it ought to be upheld now in its full force and vigor. If the jury and the judge cannot harmonize on the first trial, there ought, as a general rule, to be a second, if the judge is so much dissatisfied as to order it. He must not abuse his discretion, but let him exercise it freely and fearlessly. It is to that end that the law entrusts him with it: See *Brown vs. Oattis*, 55 *Georgia Reports*, 416.

2. We think there was ample reason for granting a new trial in the present case. The defendant's cropper and not the defendant, was the party answerable to the plaintiff: 49 *Georgia Reports*, 580.

Judgment affirmed.

JINDSAY DUNN, plaintiff in error, *vs.* **THE STATE OF GEORGIA**, defendant in error.

- . The identity of the defendant and the intent with which he makes the assault, when charged with an assault with intent to rape, are questions for the jury, and no complaint being made of any error in the charge of the court, or in the admission or rejection of evidence, and a new trial having been refused by the presiding judge, this court will not interfere.
- 1. Newly discovered evidence which ought not to have changed the verdict if in at the trial, and which might have been procured with diligence, and which counsel do not swear that they did not know at the trial, will not authorize a court to set aside a verdict and grant a new trial.

Criminal law. Rape. New trial. Before Judge **UNDERWOOD**. Floyd Superior Court. July Term, 1875.

Reported in the opinion.

WRIGHT & FEATHERSTON; **FORSYTH & REESE**, by **R. T. FOCHE**, for plaintiff in error.

C. F. CLEMENTS, solicitor general, for the state.

JACKSON, Judge.

The defendant was convicted of the offense charged, and moved for a new trial on the ground that the verdict was against the law and the evidence, and not sufficient to produce that certainty of mind necessary for legal conviction of crime, and on the further ground of newly discovered testimony. The court overruled the motion, and error is assigned here on these grounds, which alone are insisted upon.

1. A school-girl on the road home from school was rudely assailed by a young man whom she never saw. He seized her arms and tried to force her into the woods. She screamed repeatedly, and after some five or ten minutes he let her go, about the time that a Mrs. King, who seems to have lived in the neighborhood, could have reached the place, according to the girl's evidence. On her arrival at home she told her mother in great excitement, and on his return, her father also. He could not identify the man, but others show that the defendant must have been the person, from circumstances related

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by them which point clearly to him. The questions of his identity, and of the intent of this rude assault upon this school-girl, are questions for the jury. They were satisfied; the court below who tried the case was satisfied; and there being enough evidence to sustain the finding of the jury, and the act of the court in sustaining that finding, we will not, as we have often ruled, interfere in the case on this ground of the motion.

2. The other is very weak. The counsel do not swear that they did not know of the existence of the newly discovered evidence at the trial. It is doubtful (nay, it is almost certain that it would not do so,) that it would alter the verdict. One witness swears to some slight difference between the girl's evidence on the committing trial and the jury trial, and that he had not informed defendant of it. Another, that there was no appearance of a scuffle on the road; another, that the girl's mother was off at her house, a half mile from her home when the difficulty occurred, while at the trial she swore her daughter told her the circumstance shortly after she got home. The whole of it might have been obtained with diligence, and if obtained would have been of little value. We cannot interfere to grant a new trial on such a ground so supported. Perhaps it would have been better not to have inflicted so severe a sentence, when possibly the young man intended only persuasion, and in taking hold of the young lady, intended only gently to lay hold of her—"molliter manus imponere." Yet a female on the highway, particularly a school-girl in her teens, should be as safe on that highway of the state as by the fireside of her father; and should be assured of safety in the fact that the law, an invisible but all jealous and watchful guardian, ever walked on that highway by her side, and with power equal to the arm of her father at her home, would shield her from danger, or vindicate her when wronged. Robed in virgin purity, her person is sacred in the eyes of this jealous guardian; let the rude hand of no stranger touch it, either to ravish or to seduce.

Judgment affirmed.

SQUIRE YOUNG, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

1. The identity of the perpetrator of the offense is for the jury, and the evidence in this case was sufficient.
2. Evidence known to the prisoner at his trial is not newly discovered, though not known to his counsel until afterwards.
3. Newly discovered evidence, even if not strictly cumulative, may be of no higher value than cumulative evidence; since producing a first witness to a new fact may be equal, simply, to producing a second witness to an old fact of the like character.
4. Newly discovered evidence is not favored as a ground for new trial. Greatly increased caution is needed now, since promiscuous affidavits are known to be less trustworthy than formerly. Courts are not obliged to grant a new trial for newly discovered evidence unless they are reasonably convinced that on another trial there would probably be a different verdict. As a means of promoting such conviction in the judicial mind, it would be an advantageous practice to let it appear in the record not only who the new witness is, but where he resides, what is his character, and who are some of his associates or acquaintances. Affidavits to his character and credibility would be profitable.

Criminal law. New trial. Newly discovered evidence.
Before Judge HOPKINS. Fulton Superior Court. October
Term, 1875.

Reported in the opinion.

WRIGHT & HILL, for plaintiff in error.

JOHN T. GLENN, solicitor general, for the state.

BLECKLEY, Judge.

1. This case turned on the identification of the prisoner as the person who stole and rode off the horse. The evidence shows that he was recognized with tolerable certainty by three witnesses. One of them saw him catch the animal, tie, mount, and ride off. Another saw him upon the roadside with the animal hitched near him. Another, seeing him run through the woods on foot, pursued and caught him. This was in the neighborhood of where the person riding, whoever

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he was, had been seen by two other witnesses to dismount from the horse and escape into the woods to avoid capture. The jury believed that the prisoner's identity was sufficiently established to warrant them in finding him guilty, and we cannot say that they were mistaken. Even with the newly discovered evidence we cannot say that they ought, or that they probably would, find differently on another trial.

2. A part of the evidence called newly discovered is *not* so; the prisoner knew of it, and should have informed his counsel. We observe from the record that, though a colored person, and but fifteen years old, he had been to school and could write his name. He had intelligence enough to be chargeable with legal diligence in preparing for his defense.

3. The only evidence in the showing for a new trial which we can recognize as newly discovered, is that set out in the affidavit of Harrison Davis, which is simply a repetition of what was sworn to on the trial by one of the prisoner's witnesses, applied to another time and place, namely, that the prisoner was not the rider of the animal, and that the rider had a moustache. The witness examined testified to such a rider being seen on the animal in Davis street, and the new witness describes the same rider as passing the rolling mill. The only difference in the two statements is, that the former witness says nothing of side whiskers, and represents the man as old; whereas, the latter witness omits any reference to age, and mentions side whiskers as well as moustache. It may be that this new evidence is not strictly cumulative. The fact of the same rider passing the rolling mill on the horse is not the same as the fact of his passing through Davis street, and yet the whole value of both facts depends on one and the same thing, to-wit: the supposed identification of the rider as some person other than the prisoner. It is difficult to see how identifying him thus at two places by one witness at each, is any better than identifying him at one place by the same two witnesses. In the present case there is no reason to suppose that the prisoner had the horse at all, unless he had it from the time the larceny was committed until the horse was abandoned

the road beyond the rolling mill, under the pressure of suit. This being so, would not what Davis professes to have seen, count for just as much if he had seen it in Davis set with the other witness? And had he seen it there it would undoubtedly have been cumulative. Then, whether cumulative or not, in a strict legal sense, it is of no more value than if it were cumulative. It amounts only to this, that had it the prisoner would have the support of two witnesses to the denial of his identity with the rider of the horse on the morning of the larceny, and without it he has the support of only one. He proved by one witness that *he* did not, but that man with a moustache did, ride the horse off on that morning; he can now prove it by another witness, a witness that did not then know of. This is the essence of the showing when reduced down to its naked probative elements.

4. It was early ruled by this court that newly discovered evidence was not a favored ground for new trial: 10 *Georgia Reports*, 512; 12 *Ibid.*, 500. If this ground was not favored then, how watchful of it should we be now? The incentives to caution have been multiplied within a few years past, tenfold, perhaps a hundred-fold. From causes that have become too many to tell, and that are known to us all, the value of affidavits taken promiscuously has come to be low indeed. Only the most credulous of men would habitually regard the contents of such affidavits as sufficient to overcome the verdict of a jury. And unless it is reasonably apparent to the judicial mind that the new facts would probably produce a different verdict, a new trial should not be ordered: 10 *Georgia Reports*, 512. To enable judges, and especially the supreme court, to enter into this question fully, something more is needed than is generally presented. It should be known, not only who the new witness is, but where he resides, what is his character, and who are some of his associates or the persons acquainted with him. He should be brought out, so to speak, and be exhibited in daylight. Affidavits should be adduced to show his character and credibility. The fullness we recommend may be novel, but it is needful. Without further legislation,

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it cannot be *exacted* of parties as matter of law; but as a means of convincing the judicial mind in favor of meritorious applications for new trials, and of guiding discretion where the law recognizes the right and the duty of caution, it will be found profitable.

In the present case a new trial is denied because we deem the verdict of the jury warranted by the evidence; and because we are unconvinced that the newly discovered evidence, even if it is not cumulative, would probably produce a different result if the prisoner were tried over. We do not mean that the case is free from all doubt; but we are willing to leave it where it was left by the jury, and by the judge who presided at the trial and on the motion for new trial.

Judgment affirmed.

BLAKELY BAGWELL, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

Where the counsel upon whom movant almost exclusively relied to defend him were absent, one by leave of the court and the other on account of sickness, a continuance should be granted even though the court have strong reason to believe that the motion was made for delay.

Criminal law. Continuance. Before Judge HALL. Pike Superior Court. April Term, 1875.

Reported in the decision.

SPEER & STEWART, for plaintiff in error.

T. B. CABANISS, solicitor general; E. P. HOWELL, by Z. D. HARRISON, for the state.

WARNER, Chief Justice.

The defendant was indicted for the offense of simple larceny, and on the trial thereof was found guilty. A motion was made for a new trial, mainly on the ground that the court

d to continue the case on account of the absence of the defendant's counsel, Messrs. Speer & Stewart, one of whom had leave of absence from the court, and the other was detained at home by sickness. The motion for a new trial was refused, and the defendant excepted.

It appears from the record and bill of exceptions, that the defendant was indicted at the April term, 1874, of the court; that at that term he continued his case on the ground of the absence of Hudson, who the defendant stated was his leading counsel, on whom he relied to make his defense, Hudson being absent by leave of the court on account of the sickness of his family. When this showing was made, Stewart was present, Speer was absent without leave of the court. At the succeeding term of the court, when all of the defendant's counsel were present, after an ineffectual attempt to continue the case for the absence of witnesses, the defendant absented himself from the court, and his recognizance was forfeited. At the April term, 1875, the defendant was present, and again moved to continue his case on the ground of the absence of Messrs. Speer & Stewart, one of whom had leave of absence from the court and the other being detained at home by sickness, Hudson being the only one of defendant's counsel who was present. The defendant stated that he had relied on Hudson as his leading counsel until a short time before that term, but that he then relied on Speer & Stewart to manage his defense, and could not go safely to trial without their presence; that until Speer & Stewart were employed he had relied on Hudson, but since their employment he had relied on them almost entirely. The presiding judge states in his certificate, that he had no doubt that the defendant did rely on Messrs. Speer & Stewart from the first, almost exclusively, to make his defense, but that he swore, at the April term, 1874, after he had employed them, that he relied on Hudson, and that he was of the opinion that the last motion for continuance was made for delay, and therefore refused it. This court is reluctant to interfere with the discretion of the court below in refusing to grant a continuance of cases pending therein. The de-

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fendant in this case was entitled to the benefit of counsel on his trial for the offense with which he was charged. There is no dispute that Stewart was unable to attend the court on account of sickness, and that Speer had leave of absence from the court. The judge certifies that he had no doubt that the defendant did rely on Speer & Stewart almost exclusively to make his defense, and having a knowledge of the professional *ability* of the counsel employed, including Mr. Hudson, he was in a favorable position to have formed a correct opinion as to that question, and such being his opinion, we think he should have continued the case, so as to have allowed the defendant to have had the benefit of their services on the trial thereof, notwithstanding the defendant had sworn twelve months before, that he *then* considered Hudson as his counsel on whom he relied at that time. The question for the court to decide when the last showing for a continuance was made was, on which of his counsel did the defendant *then* rely to defend him; and as the judge certifies that he has no doubt that he relied on Messrs. Speer & Stewart almost exclusively to defend him, he was entitled to the benefit of their services as his counsel on his trial. The defendant may or may not have sworn falsely when he made his showing for a continuance at the April term, 1874; it does not necessarily follow that he did, and we do not think the court should have assumed that he had for the purpose of refusing him a continuance on the showing made therefor in April, 1875: *Summerlin vs. Dent*, 36 *Georgia Reports*, 54.

Let the judgment of the court below be reversed.

RICHARD WARD, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

1. Although, on an indictment for stabbing, it might be competent to convict of an assault, or of an assault and battery, or of an attempt to stab, instead of wholly acquitting the prisoner, yet where the evidence clearly proves the offense as charged, it is not error against the prisoner for the court to in-

struct the jury that they can return no verdict but one of guilty or not guilty.

2. To constitute stabbing, the knife need not enter further than to penetrate the skin and draw blood—certainly, half an inch, or even the eighth of an inch, would be deep enough.

3. Opprobrious words will not justify stabbing.

Criminal law. Charge of court. Stabbing. Before Judge POTTLE. Ogleshorpe Superior Court. October Term, 1875.

Reported in the opinion.

JOHN C. REED, for plaintiff in error.

SAMUEL LUMPKIN, solicitor general, by S. H. HARDMAN, for the state.

BLECKLEY, Judge.

1. So far as mere pleading is concerned, an indictment for stabbing would serve as a basis of conviction for assault, or assault and battery: 25 *Georgia Reports*, 396. But is either of these minor offenses practically in issue, where the evidence is clear and uncontradicted that the act of stabbing was complete, and that there was no assault or battery other than as perpetrated by stabbing, and included within the necessary constituents of that offense? In the present case, it is clear beyond all possible doubt, that if there was no stabbing there was no assault and no battery. If the evidence does not prove stabbing it proves nothing. It was therefore not error, as against the prisoner, for the court to charge, as it did, that the jury could return no verdict but one of guilty or not guilty. With such facts as the evidence discloses, the verdict was right; and the charge, if amenable at all to criticism, was less favorable to the state than to the prisoner. It put attempt to stab, assault, and assault and battery, out of the case; and the prisoner took the hazards of a single offense instead of standing exposed to that offense with several others. If the jury had thought there was no unlawful stabbing, they were precluded by the court's charge from finding any verdict but one of ac-

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quittal, whatever they may have believed as to an attempt stab, or as to an assault or assault and battery. In other words, these minor offenses were to count no more against a prisoner than complete innocence. If less culpable than was charged to be, he was to go free, as if not culpable at all. Unless guilty of the whole, he was to be treated as if guilty of no part.

2. What is stabbing? Must the knife enter to a given depth? The court charged, in substance, that it must penetrate the skin and draw blood, but that it need do no more. We accept this test in the light of the facts of the present case. The cut was in the back with a pocket knife. It bled, and gave much pain. It made the shoulder stiff, and was two or three weeks in getting well. It was estimated by the prosecutor to be about half an inch deep, and by another witness to be about the eighth of an inch in depth. A man with such a puncture in the back, inflicted in anger by an assailant, might be considered pretty effectually stabbed: 2 Bouvier's Law Dic., 541—"Stab;" 1 Bish. Cr. Law, section 193.

3. Opprobrious words are no justification of stabbing. It required a statute to authorize the jury to treat them as justifying a battery. No statute has yet been passed, and probably never will be, to sanction stabbing as a means of resenting offensive language.

Judgment affirmed.

JAMES L. TARPLEY *et al.*, plaintiffs in error, *vs.* ROBERT L. MCWHORTER, guardian, defendant in error.

1. Prior to January 1, 1863, when the Code went into effect, a guardian had the legal authority to loan the funds of his ward to solvent persons, and under the act of April 18th, 1863, he could lawfully receive Confederate interest-bearing notes in payment thereof.
2. Under the act of December 11th, 1862, a guardian had power to appoint an agent to act for him in his absence in the Confederate army, and any act of the agent within the scope of his authority would be as valid as that of the guardian.

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3. Where all the parties to the payment of notes belonging to the ward, well knew that the notes belonged to the ward, and that the title to the notes was in the absent guardian, legal possession alone of the notes is not conclusive of the agency of the holder of them, so as to discharge the makers and relieve the guardian of liability.
4. The guardian, in a contest between the heirs of a lunatic and himself touching his administration of the ward's estate, is a competent witness, the heirs being in life and also witnesses in the case.

Guardian and ward. Principal and agent. Promissory notes. Witness. Before Judge GIBSON. Greene Superior Court. September Adjourned Term, 1875.

Reported in the opinion.

A. G. & F. C. FOSTER; J. A. BILLUPS, for plaintiffs in error.

REESE & REESE; P. G. ROBINSON, for defendant.

JACKSON, Judge.

This was a bill brought by one Broughton, a lunatic, in his lifetime, against McWhorter, his guardian. Pending the litigation the lunatic ward died, and his next of kin and heirs were made parties. The bill is now proceeding in their names. They seek to make McWhorter account for the estate of the ward in his hands. He accounted for that estate by showing that while in the Confederate service he left certain notes on his brothers in the hands of one Caldwell, his general agent, with instructions to do the best he could with them under the law and in the interest of his ward. These notes were all the estate, except negroes, which were freed, and whose hire had been expended for the support of the ward. During McWhorter's absence his brothers paid the notes to Caldwell in Confederate interest-bearing notes, and the same notes were produced. The payment was made in the winter of 1863-4, probably in December, 1863, from the best light thrown on the transaction. The main question in the case is, was this payment to Caldwell, the agent of Mc-

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Whorter, a legal payment, and is McWhorter thereby discharged?

1. The act of April, 1863, fully authorized McWhorter he had been at home, to receive the Confederate interest-bearing notes; that question was ruled by this court at the first term, and had been ruled substantially, often before.

2. The question then is, did his agent receive this money and was he authorized to do so? This bill calls for discovery, and responding to it, the defendant says that he left the notes in question with Caldwell, with directions to do what he could with them for the best interest of the ward; and that on his return he found that payment had been made of them. If the custody of the notes was committed to Caldwell with this instruction, Caldwell was the agent of McWhorter in respect to these notes, and was, as such agent, authorized to receive payment. See act 11th December, 1862, and act of 18th April, 1863; pamphlet laws of Georgia, 1862-3, pages 29, 143. But McWhorter swore on his oral examination before the jury, that Caldwell was not authorized to do any act for him as guardian, and there appears to be a seeming inconsistency in the two statements. It is possible that he meant that Caldwell was not authorized to make returns or act as guardian in business of that sort, but not that he was not to collect, or to treat these notes to the best advantage for him; for otherwise the answer sworn to cannot be reconciled with the sworn testimony on the stand. Mrs. McWhorter in her testimony, swears of Caldwell as the agent of her husband. J. H. McWhorter swears that he paid the money to Caldwell, agent of defendant, and that "Miles Caldwell was appointed general agent of defendant in his (my) presence to transact all of his business of any and all kinds during his absence in the army." Miles Caldwell swore that he "did all kinds of business for him, defendant, as a general agent," and "collected money from W. H. and J. H. McWhorter in the latter part of 1863 or first of 1864." This is the entire evidence in respect to this agency. On this question, the court charged as follows: "If respondent in good

faith, through himself or agent, received the money in accordance with a then law of the state, and the money now produced is the very money received in payment of the notes held by him or his agent, then he is not liable to complainants for said sum." Again, at request of complainants' counsel, the court charged "that if Miles Caldwell was general agent of defendant, for the transaction of his business during the war, but was not specially authorized by defendant to act as his agent in transacting the business of the trust estate, and received Confederate money in payment of notes held by defendant as trustee or guardian, said Caldwell acted without authority, and his receiving that Confederate money is not binding upon the complainants and does not relieve defendant from liability;" to which he added, "the legal holder of a negotiable paper or note, or other evidence of debt due a trustee or guardian, is the legal and lawful agent of such trustee or guardian, and can collect and receive payment thereof without any authority of the guardian. Any person making payment to a legal holder of a negotiable note is discharged by such payment, and no special authority is necessary for such payment."

3. The latter part of this charge, under the facts of this case and the circumstances surrounding this transaction, we consider erroneous. All these parties knew, they must have known, that the notes were the property of this ward, and belonged to the guardian as trustee. The mere fact that anybody held them would hardly, we think, make such holder a proper party to receive the money as agent, without more. If the makers of these notes found them in possession of some holder in whom they thought the title was and paid them, it would have discharged them; but when they sought these notes in the hands of McWhorter's wife, or his overseer, and knew that the title was in him as the guardian of this lunatic, before payment to the wife or overseer could discharge them, they should have been assured that the wife or overseer was McWhorter's agent to receive the money. While the possession of the notes would strengthen the idea that Caldwell was

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agent in this matter, apparently controlling them as such, yet that fact *alone* is by no means conclusive of his agency. Yet such was the substance and effect of the charge. This charge may have controlled the case. It may have drawn the mind of the jury from the true issue, which was this: did the parties understand that Caldwell was agent to receive the money? and with that understanding, did they pay it to him? Was he appointed to do this business? Did his general agency extend to this transaction, and did the makers of the notes in good faith pay them with that understanding? If so, McWhorter could not have recovered from the makers on his return from the army, and would not be responsible himself. He must have left the notes in Georgia, and if he left them with Caldwell, as his answer asserts, to do the best he could in respect to them, and they, the makers, found them in Caldwell's hands, and understanding him to be the agent of the guardian, paid what Caldwell, as agent, was authorized by law to receive, then the guardian could not have recovered the money so paid by them from them, and having acted in good faith himself, would be discharged from all liability. But if the makers took advantage of the absence of the guardian, who swore that he would not have received the money if present, to pay in a depreciated currency these notes to an illiterate general agent who had no authority to act in this particular transaction; if this transaction was an expedient to get rid of this debt due to this lunatic at a sacrifice, the money having been loaned to them when good as gold, there being no agent empowered to receive it, then it would not discharge the guardian unless subsequently ratified by him in good faith. The guardian had a discretion under the act of April 18, 1863, to receive this money or not. The language of the act is, "it shall be lawful," etc., to receive the Confederate money; not that a trustee must receive it. This discretion could be transmitted to an agent under the act of 11th December, 1862, and such agent for such business could also receive the money and deliver up the notes, the discretion being transferred by appointment to him; so that the question, in our view of the

law applicable to the facts here, is narrowed to the issue, was Caldwell such an agent, entrusted with these notes for this purpose to do the best he could with them, to represent McWhorter in respect to them, and did he, *bona fide*, so represent McWhorter, and these debtors so pay the notes. On this issue we incline to think the evidence preponderates that he was such an agent, and but for the testimony of the guardian himself, on the stand, apparently in opposition to his statement in his sworn answer, notwithstanding the error of the court, as we think, in the addendum to the request of complainants' to charge, we should not have sent the case back. On his own evidence, out of his own mouth, the jury may have convicted him but for this charge; and therefore we think they had better again pass upon the issue of agency or no agency for this business. If the jury should find that Caldwell was not the agent for this purpose, and these makers of the notes paid them to him wrongfully, then the question will arise did McWhorter ratify, on his return home, and will that protect him? The answer to this question turns, we think, on *bona fides* and diligence. What would a prudent man of business have done with his own notes in such a case? Would he have sought to recover them, or would he have let the money go? Returning and finding the notes paid and gone—in the pockets of the makers—would a prudent man of business, such a transaction having occurred in reference to his own paper left like these notes were, have sued the makers and sought to recover, or would he have let the matter rest just where he found it? Considering the debtors on the paper strangers and not related closely to McWhorter, what would he, as a prudent man of business, have done with his own notes so paid in his absence? Would he have risked more money after these debts, or taking all the chances of recovery and the expenses and trouble of litigation, would he have let it alone? If, on his return, he acted with the diligence of a prudent man of business and in good faith, in declining to press the matter upon these debtors, though the agent had not been entrusted specifi-

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cally with the notes, and though, had he been present, would not have taken the money, then his ratification and acquiescence would protect him; but if he failed to display such diligence, and did not act in good faith in such acquiescence, then he would be bound for the debts. As the best we can do, in the light shed upon the case by the law and facts, as we understand them, we send the case back on the two issues: the agency of Caldwell to transact this business for McWhorter, as explained above, and if not the agent, then the good faith and diligence of McWhorter, as explained above, on his return. Let the jury pass upon these two questions.

As heretofore ruled, the proper practice is not to read the requests to the jury if the court means to decline to give them.

4. We think McWhorter was a competent witness, and as he was on the stand and could verify his account, we see no objection to his receipt to himself going in, his account being thus proven on the stand. We see no error in the refusal to charge in respect to the acts of the legislature, as requested, and in charging as he did thereon; nor do we see error in the views of the court touching section 2330 of the Code. That section cannot apply to this case; the money was loaned before it became law. Nor do we think he erred in holding that the guardian, before January, 1863, had the right to loan to solvent persons, and after April, 1863, had the right to receive it back in Confederate funds under the act of April 18th, 1863. So of all the other numerous assignments of error. This case has been twice tried. It was here before, and then it was ruled that the defendant must show affirmatively that this very money was received by him in good faith: 53 *Georgia Reports*, 291; and it was sent back on that point. Now we send it back, with regret, on the issues of agency and ratification, because two juries have passed upon the case. The single error which forces us to do so, is the addendum of the court to the request of complainants, which, we think, might have misled the jury and drawn them away from the true issue. We sincerely hope that it may be so given to the jury on the

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xt trial, as not to require any further discussion of it, either the court below or here. We have felt it our duty to administer to complainants in this case, the extreme measure of air legal rights, because transactions between brothers and estate of a lunatic ward are involved; and notwithstanding the verdict of two juries under the rulings of two judges, we give them therefore one more hearing on the issues hereinbefore explained.

Judgment reversed.

W. COWART, sheriff, plaintiff in error, *vs.* T. J. DUNBAR & COMPANY *et al.*, defendants in error.

When a rule issues against a sheriff requiring him to show cause why he should not be attached for contempt for failure to levy certain executions on property shown to have been in the possession of the defendant, the measure of his liability is the injury thereby sustained by the plaintiff. He may therefore show that the property in the possession of the defendant belonged to some one else.

Sheriff. Attachment. Damages. Before Judge HERCHEL V. JOHNSON. Emanuel Superior Court. April term, 1875.

Reported in the decision.

CHARLES B. KELLY; JOSEPHUS CAMP, by Z. D. HARRISON, for plaintiff in error.

JOHN M. STUBBS; H. D. D. TWIGGS, for defendants.

WARNER, Chief Justice.

This was a rule against the sheriff of Emanuel county, and the record contains the following statement of facts:

Defendants in error obtained judgments against John L. McLemore at the November term, 1871, of Emanuel superior court, on which judgments *fi. fas.* were issued November 13th,

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1871. At the April term, 1874, of said court, a rule was issued against the sheriff because of his failure to levy *see fi. fas.* The sheriff answered the rule, saying he had made search but could find no property. His answer was traversed and on the trial of the issue thus formed plaintiffs in *fi.* introduced in evidence the said *fi. fas.*, with entries of *reud bona* thereon. They also introduced the following oral testimony :

JOHN M. STUBBS, attorney for plaintiff in *fi. fa.*, swore that at the April term, 1873, deputy sheriff Cannady told him that defendant in *fi. fa.* was in possession of a horse and buggy, but that he did not know who owned it. Witness told him to levy on them, to which Cannady replied he would if he (witness) would point out the property. Witness at same time also instructed Cannady to ascertain if defendant in *fi. fa.* had any interest in a certain store-house and lot in the town of Swainsboro, and that if he found such interest, to levy on the same; that at the April term, 1874, witness asked Cannady if he had made the money on these *fi. fas.*; that Cannady run out his tongue with an expression of surprise and said he had forgotten it; witness then told him he would have to rule him, to which Cannady replied: "Well, go ahead; you have not paid me the cost in these cases anyhow."

S. A. PUGHSELY swore that he saw defendant in *fi. fa.* in possession of property in 1869, 1870 and 1871; he was in possession of, and exercised acts of ownership over, a horse and buggy in 1872 and the early part of 1873; his possession of horse and buggy and claim of ownership was open and notorious; horse and buggy were worth \$325 00 or \$350 00; after 1871 defendant in *fi. fa.* was in possession of store-house and lot in Swainsboro; the house was built by Sherod in 1872; defendant's possession thereof was in 1872 and part of 1873; witness, at the time this rule was brought, and still is, in employment of plaintiff in *fi. fa.*

JOHN H. SHEROD swore that he built the house on the Moore lot, and finished the same in June, 1872, and then de-

red possession thereof to defendant in *fi. fa.*, who retained possession of it about one year; store-house and lot worth \$1,000 00; the dwelling house now occupied by defendant in *ex. is* worth \$1,500 00, and has been in his possession since completion last year; saw defendant in *fi. fa.* in possession of horse and buggy in 1872 and part of 1873; said horse and buggy were worth \$350 00; the possession of all this property was open and public; the sheriff's office, in the town of Swainsboro, is within one hundred yards of said store-house.

H. M. SUTTON swore that he built the dwelling house occupied by defendant in *fi. fa.*; it is worth \$2,500 00; completed in 1874; defendant in *fi. fa.* was in possession when the use was commenced, and has since then retained possession; the store-house is worth \$450 00; store-house and lot worth \$1,000 00 or \$1,200 00.

Respondent introduced the following testimony:

WILLIAM CANNADY, deputy sheriff, swore as follows: Had no recollection of conversations testified to by Colonel Stubbs; don't remember to have told him that I had forgotten to levy *fas.*; don't remember that he said he would rule me, and at I replied, "Go ahead; you haven't paid me the cost on these cases anyhow." I have not seen defendant in *fi. fa.* in possession of any property since I have been in possession of *ex. fi. fas.* I and Cowart, the sheriff, went into office in February or March, 1873.

Cross-examined.—Am quite positive I never had any such conversation with Colonel Stubbs, as stated by him. Don't recollect that I swore on the last trial of this case that I could not swear these conversations had not taken place. Here counsel for plaintiffs in *fi. fa.* read from witness's recorded testimony on the former trial, which was an approved brief, agreed upon by counsel on former motion for new trial, as follows: Witness would not say that he did not tell Stubbs that he had forgotten to levy and that Stubbs had not paid costs of said suit.] Counsel asked if this was not his testimony on former trial. Witness replied, "If it is so recorded,

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I must have so testified, but I do not remember it." Had seen defendant in *fi. fa.*, and his brother Lawson McLemore, selling goods in two or three stores about town, but don't know which was in possession of the houses.

MATTHEW OVERSTREET, sworn: Went into possession of store-house referred to in Jannary, 1873; Lawson McLemore was in possession when I went it; defendant in *fi. fa.* is my son-in-law, and was not in possession of house at that time.

CHESLEY FAIRCLOTH, sworn: I went into possession of store-house in fall of 1872; Lawson McLemore put me in possession; he was in possession before I went in.

Defendant in *fi. fa.*, sworn: Was never in possession of store-house; kept post-office in portion of store-house. Since I have been post-master I have kept post-office in several stores belonging to others; others kept post-office for me.

Defendant offered to prove by the witness, H. W. Sutton, called by plaintiffs, that the house occupied by John L. McLemore, defendant in *fi. fa.*, as a dwelling house, was built by witness for Ira T. McLemore, father of defendant in *fi. fa.*, and that the defendant in *fi. fa.* was in possession merely as a tenant of his father, Ira T. McLemore, who was then, and has been ever since, the owner of the premises.

To this evidence the plaintiffs objected, the court sustained the objection, and refused to allow the evidence to go before the jury. To which ruling and decision of the court the defendant excepted.

Defendant offered to prove by the witness, John L. McLemore, that he, the defendant in *fi. fas.*, was not the owner of the horse and buggy testified to by plaintiffs' witnesses, and that he never exercised acts of ownership over said property, nor had the same in possession, except when he had borrowed them for a short time, and that L. A. McLemore, his brother, was the owner of said property and in possession of the same.

To this evidence the plaintiffs objected, and the court sustained the objection, and refused to allow the evidence to go before the jury. To which ruling and decision of the court, in rejecting said evidence, defendant excepted.

defendant then offered to rebut the evidence of John She introduced by the plaintiffs, as to the building, possession and ownership of the store-house, by the witness, John McLemore, by whom defendant offered to prove that the witness, who is the defendant in *fi. fa.*, did not contract for building of said house, and that he was never in possession of the same, but that witness' brother, L. A. McLemore, built the house, and is the owner of the same, and had in possession of the house ever since its construction.

On this evidence the plaintiffs objected, and the court sustained the objection, and refused to allow the evidence to go to the jury. To which ruling and decision of the court, rejecting said evidence, the defendants excepted.

The defendant having offered no other evidence, the case was submitted to the jury. The judge charged the jury as follows:

Gentlemen of the jury—Two *fi. fas.*, the one in favor of J. Falk & Company, and the other in favor of T. J. Dunbar & Company, *vs.* John L. McLemore, were placed in the hands of the sheriff for collection early in the year 1873. Having failed to make the money thereon, a rule *nisi* was issued against him at the April term, 1874, to show cause why, etc. In response to that rule the sheriff answered that he had searched and could find no property whereon to levy said *fi.*

The plaintiffs in *fi. fa.* traversed said answer, and added that when called on by plaintiffs' counsel and asked why he had not collected the *fi. fas.*, the sheriff answered "that he had forgotten it," and added, "you have not paid the cost on the *fi. fas.*, anyhow." The issue thus made up forms the subject matter of your present deliberation.

The sheriff having answered the rule officially, under oath, in response to plaintiffs' call, the presumption of law is that his answer is true, and that presumption is conclusive unless traversed and rebutted by proof. Hence the traverse in this case. On the one hand, the sheriff says he searched and could find no property to levy said *fi. fas.* On the other hand, the plaintiffs say his answer is not true, but so far from

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making any "search" for property he confessed to the plaintiffs' counsel that he "forgot it," and urged as an additional excuse that the plaintiffs counsel had not "paid the cost said *fi. fas.*, anyhow." Now, gentlemen, if the sheriff's answer to this rule *nisi* be true, then he has done his duty—the rule should be discharged. But the plaintiffs in *fi. fa.*, say is not true. Their allegation is (I repeat) that the sheriff said he forgot it, and that the cost on the *fi. fas.* had not been paid anyhow. Now, if the allegation of the traverse be true, then the sheriff's answer is not true. If he forgot the matter, it is certain that he did not search for the property. Both cannot be true. If you find from the evidence that he did search and could find no property, etc., he is not liable under this rule. But if you find that he did not, that he said he "forgot," and failed to levy because he "forgot it," or because "cost on said *fi. fas.* had not been paid," he is liable.

"The defendant's counsel requests me to charge you that if the sheriff's answer is taken as true, he is not liable. I do so charge you, as I have once or twice already stated. The defendant's counsel requests me to charge, that if you find from the evidence that the defendant in *fi. fa.* was not in possession of property subsequently to the sheriff's coming into office, he is not liable. I so charge you.

"This brings me, gentlemen, to the real question for your consideration, and that is, was the defendant in possession of property since the sheriff came into office? This is purely a question of fact for you to determine. You have heard the evidence concerning the alleged possession by the defendant in *fi. fa.* of a horse and buggy, a store house and lot, and a dwelling house and lot, in this town, worth, as the plaintiff alleges, from \$2,500 00 to \$3,000 00—enough, as they insist, to have satisfied their *fi. fas.* The matter of evidence in this cause falls exclusively within your province. I intimate no opinion—would not do so if it were my right—as to what has or has not been proven on this question of possession, or indeed upon any question involved in this case. You will inquire, therefore, what has been proved in reference to it. If

and, from the evidence, that the defendant was in possession of that or any other property, the sheriff was bound to make a faithful effort to levy and bring it to sale.

Here I read one of the *fi. fas.*, and called the attention of the jury to the language of command, viz: 'We command thee.' (etc.) From this you see, gentlemen, that as a mere executive officer, he was bound by judicial command to levy. Obedience to this his official oath binds him faithfully to execute all writs, warrants, precepts, and processes, directed to him. From this you will perceive, also, gentlemen, that it is not necessary for the plaintiff or his counsel to give special notice to levy; that order is embodied in the writ of *fi. facias*, coming from a source superior to either plaintiff or his counsel, nor is it necessary for plaintiff or his counsel to point out the property in the possession of the defendant, for the writ commands to levy it, nor can the sheriff demand the payment of it in advance, and even if he could, he should make no demand before he can act upon its non-payment as an excuse for failing to levy. Nor can the sheriff excuse his failure to levy by saying 'he forgot it;' nor can he excuse himself by saying that the property in the possession of the defendant is the property of somebody else, and not subject to execution *fi. fas.* in his hands.

The law does not permit him to set up a forum in his bosom to decide the title to property. That is a question on which the plaintiff in *fi. fa.* has a right to be heard. The sheriff cannot place himself in the position of, and take sides with, the defendant in *fi. fa.* He must make a faithful effort to bring to sale property in possession of the defendant. Such possession is *prima facie* evidence of title in him, and the sheriff must act upon that presumption. He must levy. If met and stopped by legal interposition, such as a claim asserted, or an injunction by a third party, he will be free from blame, free from liability. I repeat, therefore, that if it is proved from the evidence that the defendant, McLemore, was in possession of property at any time since the sheriff came into office, and he failed or refused to levy and try to

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bring it to sale, he cannot be exonerated by setting up any of the excuses just mentioned; he is liable to the extent of the value of the property so in possession. You will, therefore, if you find such possession of property in the defendant, ascertain its value from the evidence before you. In considering evidence it is your duty, if possible, to reconcile conflicting statements and contradictory witnesses, without imputing perjury to any.

"When one witness testifies positively one way, and another equally credible testifies as positively the other way, it is like two equal forces acting in opposite directions. Nothing in relation to matter thus testified of is proven. Affirmative testimony outweighs, in law, negative testimony; that is to say, one witness who swears affirmatively to a fact, outweighs the testimony of two or more who only swear negatively.

"These, gentlemen, are the principles of law applicable to this case. It is one of importance to the parties litigant. Let me admonish you to free your minds from all bias or partiality. Know nothing, gentlemen, but the case as it is exhibited to you by the evidence."

To which charge respondent excepted.

The jury retired, and returned with a verdict in favor of defendant. Plaintiffs in *fi. fa.* made a motion for a new trial on the following grounds, to-wit:

1st. Because the jury found contrary to the law and the evidence.

2d. Because the jury found contrary to law.

3d. Because the verdict is contrary to evidence and the charge of the court.

4th. Because the verdict is contrary to the charge of the court.

5th. Because the verdict is strongly and decidedly against the weight of evidence and the charge of the court.

The court granted a new trial; to which judgment granted a new trial the respondent excepted.

There was no error in the charge of the court in view of the evidence before the jury, nor in granting a new trial on

ground that the verdict was contrary to that charge, and it would dispose of the case; but as there is to be a new trial, and the counsel for the defendant in error have expressed a desire that we should decide the question as to the admissibility of the evidence offered to be proved by the witnesses H. W. Sutton and John L. McLemore, as set forth in record, we will proceed to do so. The 3949th section of Code declares that the sheriffs of this state shall be liable on an action on the case, or an attachment for contempt of court, at the option of the party, whenever it appears that such sheriffs have *injured* such party, either by a false return, by neglecting to arrest a defendant, or to levy on the property of the defendant, or to pay over to the plaintiff or his attorney any moneys collected by such sheriffs by virtue of any *fi. fa.* or other legal process, or to make a proper return on any writ, execution or other process put into the hands of such sheriff. Thus it will be perceived that when a plaintiff *fi. fa.* has been injured by the failure of the sheriff to levy on the property of *the defendant*, he has his option of one of two remedies against the sheriff, either by an action on the case or by a rule calling upon him to show cause why he should not be attached for contempt of court. When the plaintiff elects to pursue the latter remedy against the sheriff, the measure of the sheriff's liability to him is the value or amount of the injury which he has sustained by the failure of the sheriff to levy his *fi. fa.* on the property of the defendant; that is the amount for which the plaintiff is entitled to judgment against the sheriff in that proceeding so far as the plaintiff himself is concerned. Why should the plaintiff, when he elects to pursue his remedy under the statute by an attachment for contempt against the sheriff, be entitled to a judgment for his benefit for any greater amount than the actual injury which he has sustained by the failure of the sheriff to levy his *fi. fa.* on the defendant's property? Why should not the sheriff be allowed, as well as the plaintiff in that proceeding, to show what was the *actual injury* sustained by the plaintiff? According to the rulings of this court in

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Dobbs vs. The Justices, etc., 17 *Georgia Reports*, 624, and *Carroll vs. Phillips*, 18 *Georgia Reports*, 469, this is not an open question here. The sheriff offered to prove that the property in the defendant's possession was not his property, and therefore that the plaintiffs had not been injured by his failure to levy on it. In our judgment, this evidence was competent and should have been received. It is unquestionably the duty of the sheriff to levy on property found in the defendant's possession, as a general rule, because the possession of property is *prima facie* evidence of title, and when a sheriff is ruled for not levying a *fi. fa.* on property in the defendant's possession, the burden of proof is on him to show that it was not the property of the defendant. The writ of *feri facias* commands the sheriff to levy on the property of the defendant, but it does not necessarily follow that because the defendant has property in his possession that it is *his property*; as, for instance, the defendant might hire a horse and buggy from a livery stable to use for a few days, and have the same in his possession, and the sheriff fail to levy on it, should the sheriff, when ruled by the plaintiff in *fi. fa.* for failing to levy it on the horse and buggy, be prevented from showing that it was not the defendant's property, and therefore that the plaintiff had not been injured by his failure to make the levy? We think not. It was insisted on the argument for the plaintiffs in *fi. fa.* that it was the duty of the sheriff to levy it on any property found in the defendant's possession, and that he could only protect himself from liability to the plaintiff by showing that a claim had been interposed to the property by some third person; that undoubtedly would have excused the sheriff from bringing the property to sale if he had levied on it, but the foundation of the plaintiffs' proceeding against the sheriff is his failure to levy on the property in the defendant's possession, whereby he has been injured. Whether the plaintiffs have been injured by the failure of the sheriff to levy their *fi. fas.*, on the property in the defendant's possession, depends on the fact whether it was the defendant's property, or the property of some other person. The *prima*

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cie legal presumption is that it was the defendant's property, and that the plaintiffs were injured by the failure of the sheriff to levy on it, and the burden of proof was on the sheriff to show that *prima facie* legal presumption, by clear and satisfactory evidence (as much so as if a claim to the property had been interposed by a third person,) that the property in the defendant's possession was not his property, and was not able to be seized and sold as such by virtue of the plaintiffs' *fi. fas.* If the property in the defendant's possession was not his property and was not subject to the plaintiffs' *fi. fas.*, then the plaintiffs have not been injured in contemplation of the statute, by the failure of the sheriff to levy their *fi. fas.* thereon, and should not be held liable to the plaintiffs for the value of that property, otherwise he would be liable to the plaintiffs for its value.

Let the judgment of the court below granting the new trial be affirmed.

S. MAYER & COMPANY *et al.*, plaintiffs in error, vs. WOOD, MARCH & COMPANY *et al.*, defendants in error.

When a debtor is in insolvent circumstances and makes an assignment to certain favored creditors, of goods to pay debts due them, and a bill is filed by other creditors alleging fraudulent combination and conspiracy between the preferred creditors and the debtor, and it is not alleged that the complainants claim title to the goods so assigned, or have any judgment or lien thereon, or that the parties to whom the assignment is made are insolvent, an injunction should not be granted, though the facts and circumstances may point to such fraudulent conduct as to induce the court to retain the bill, and investigate on the hearing the whole case, and decide and decree the equities arising thereon.

Debtor and creditor. Injunction. Before Judge WRIGHT.
Dougherty County. At Chambers. January 6th, 1876.

Reported in the opinion.

WARREN & HOBBS; D. H. POPE, for plaintiffs in error.

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R. N. ELY; J. ARMSTRONG; VASON & DAVIS, for defendants.

JACKSON, Judge.

J. W. Feagan, a merchant in Albany, failed. S. Mayer & Company, and Richard Hobbs, an attorney at law of the firm of Warren & Hobbs, representing certain other creditors took an assignment of Feagan's goods to the amount of their respective claims. Hobbs had procured a policeman to watch Feagan, and had discovered that he was removing his goods in large quantities. Efforts were made by him to sue out an equitable attachment but failed. Finally, on the afternoon of the ... day of December, 1875, a bill of sale was taken by Hobbs to \$2,500 00 worth of Feagan's goods, and by S. Mayer & Company to the amount of their claim, and another bill of sale to \$500 00 worth of the goods was taken by Hobbs to Warren & Hobbs, to act as counsel for Feagan. In the night of that afternoon the parties met Feagan at his stores, there were two of his stores in Albany, and took an inventory and estimate of the value of the goods, and the same night, as fast as they were valued by the private sale marks of Feagan, and set apart, they were carried off to other stores. The keys of the stores of Feagan were delivered to Hobbs in the afternoon, when the bills of sale were drawn up and delivered. All the goods in Feagan's two stores were thus carried off to other stores at night, but all, according to the evidence of those present at the valuation, did not equal the amounts of the bills of sale. The bills of sale are not in the record, nor do they appear to have been in evidence; at least no copies of them appear of record here. Wood, March & Company, and many other creditors, file a bill alleging fraud on the above recited facts in Mayer & Company and Hobbs and his clients, and pray that they be enjoined from disposing of the goods until the facts can be ascertained and passed upon by a jury. They allege combination between Feagan and these defendants, and that the goods were worth \$10,000 00, and that these defendants and

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again have got all for some \$4,000 00; that these goods have been mixed with others; that they cannot well be reached by law, but equity alone can ferret out such fraudulent conduct and conduct. They further charge that an assignment was advised to be made by Pope, Feagan's first attorney, of all Feagan possessed, for the benefit of all the creditors, but it was defeated by Hobbs, who, by becoming employed by Feagan, got the assignment for his own clients and his own fees, and thus fraudulently injured the complainants. The bill was answered, and evidence *pro* and *con* taken and deposition. The chancellor granted the injunction; but subsequently, by agreement of the parties, modified it, allowing the defendants to sell and hold the proceeds, dissolving certain attachments and garnishments which had been sued out at law by the complainants, or some of them.

The question brought here is, whether there is such equity in this bill as will entitle complainants to an injunction. No proof of title of any sort to the goods in question in any complainant was before the chancellor, no creditor held any specific lien on any of the goods, nor was any complaining creditor a judgment creditor. It is true that it is alleged that Feagan was insolvent when he bought goods from complainants and never meant to pay for them, and got no title, but it is not stated that these bought by defendants are the goods so purchased from complainants. We see nothing, therefore, in this record to take this case out of the ruling of this court in *Cubbedge & Hazlehurst v. Adams*, 42 *Georgia Reports*, 124; and the cases which have followed that case; and especially in the absence of any allegation of insolvency on the part of the principal defendants, who alone are served and received the goods, and against whom the injunction is granted, we think the court erred in granting the injunction. That is the sole question before us, and the only question which could be brought for our review at this early stage of the case. We do not then decide that there is no equity in this bill, but only that there is no such equity in it as will empower a chancellor to use the extraordinary remedy of injunction against these defendants. The

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Every aspect of the case does not look well for the creditors to the bill. The bills of sale are not produced, and were hurriedly valued at night, they were hurriedly made at night, they seemed to have been taken to court with very unseemly and suspicious haste, the counsel for the creditors who are preferred becomes counsel for the insolvent debtor, a bill of sale is made to him of part of the goods to pay a retainer fee for this insolvent debtor, and thus the most vigilant enemy of the man who has smuggled off a large portion of the goods, and who undoubtedly has committed a great fraud on all the other creditors, is transferred, by virtue of the fee of part of the goods to himself and others to his clients, into his fast friend and legal adviser and defender. We say the outlook is not handsome; the affair may need a closer scrutiny, and as the proceedings at law seem, by the agreed order, to have been merged into this bill, we wish to be distinctly understood as only reversing the judgment of the court below in granting the injunction, and not as passing judgment at all upon the question of general equity which the facts may make.

Judgment reversed.

LARKIN H. DAVIS, administrator, plaintiff in error,
THOMAS C. HOWARD, defendant in error.

1. An order granting leave to an administrator to sell land, obtained upon published notice required by section 2559 of the Code, is valid authority to sell is concerned.
2. Upon ejectment against the heir in possession, such order will not be conclusive of the question of their being debts of the intestate or *Aliter*, if obtained upon personal notice to the heir of such application.

JACKSON, Judge, dissenting:

1. A judgment of a court of general and exclusive jurisdiction, upon want of notice or irregularity in the mode of giving it, should be set aside in the court which rendered it, and if the notice to defendant is defective, the judgment should be there set aside: Code, section

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- . Courts of ordinary are courts of original, general and exclusive jurisdiction of the sale and disposition of the real property belonging to, and the disposition of, deceased persons' estates, and of all other matters and things relating to estates of deceased persons: Code, section 331.
- . Section 2486 of the Code empowers the ordinary to grant an order to sell real estate in the possession of the heir to pay debts of the estate; and this order, after notice to the defendant, is conclusive evidence that the administrator needs the land to pay debts. No defective notice appearing on the face of the proceedings, the presumption is that the proper notice was given before the court granted the order to sell, and the judgment of sale is a valid subsisting judgment of a court having jurisdiction of the subject matter and the parties, and will stand as such until set aside on proof that the proper notice was not given: Code, section 2486.
- 1. It follows, when the heir is sued in ejectment by the administrator and has to meet on the ejectment trial this apparently valid and conclusive order, and has moved in the court of ordinary to set it aside because the notice was a mere advertisement, when he was entitled to personal notice under section 2486 of the Code, and because he can show the court that there were no debts to pay, and when this question was pending in the superior court on appeal from the ordinary, but the ejectment was first on docket and would be first reached, and this judgment of the ordinary would confront and conclude him, it follows that on a bill in equity alleging the foregoing facts, an injunction should be granted to postpone the ejectment until the motion to set aside the judgment could be heard.

Injunction. Administrators and executors. Judgments. Notice. Ejectment. Before Judge PEEPLES. DeKalb County. At Chambers. February 22d, 1876.

Reported in the decision.

L. J. WINN; L. J. GLENN & SON, for plaintiff in error.

B. H. CLARK, for defendant.

WARNER, Chief Justice.

This was a bill filed by the complainant against the defendant as administrator of Jane C. Howard, deceased, praying for an injunction to restrain the defendant from prosecuting an action of ejectment pending in the superior court of DeKalb county, until an appeal case from the court of ordinary, pending in said court, should first be tried. On the hearing

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of the application for the injunction prayed for, the chancellor granted it, whereupon the defendant excepted.

The allegations in the bill, upon which the complainant's equity is based are, that at the death of the defendant's intestate the complainant was her sole heir-at-law; that the land which the defendant is seeking to recover in his ejectment suit descended to him as such heir; that he is in the possession thereof, and that the defendant's intestate owed no debts at the time of her death; that the defendant obtained an order from the court of ordinary for leave to sell the land of his intestate for the payment of her debts, upon the issuing of the usual citation by the ordinary, and publication thereof, as required by the 2559th section of the Code; that the complainant never saw that published notice, and had no other notice of the application for leave to sell the land by the defendant until after the order was granted; when he ascertained that such an order had been granted he applied to the ordinary to have said order set aside, on the ground that he had no legal notice of the application for leave to sell the land of the defendant's intestate, which motion the ordinary overruled, and the complainant entered an appeal to the superior court; that the ejectment suit of the defendant stands first on the docket of that court, and will be called and tried before the appeal case, unless the defendant shall be restrained from doing so by the injunction prayed for. Assuming the allegations in the complainant's bill to be true, as the defendant's demurrer thereto does, are the same sufficient to authorize a court of equity to interpose by granting the injunction prayed for by the complainant? The solution of this question necessarily depends as to what is the proper construction to be given to the statutes in relation to the question involved. The 2559th section of the Code declares that "If at any time it becomes necessary for the payment of the debts of the estate, or for the purpose of distribution, to sell the land of the decedent, the administrator shall, by written petition, apply to the ordinary for leave to sell, setting forth in the petition the reason for such application; and no-

tice of the same shall be published once a week for four weeks before the hearing, in the gazette in which the county advertisements are published. If no objection is filed, and the ordinary is satisfied of the truth of the allegations in the petition, an order shall be passed granting the leave to sell, specifying therein the land as definitely as possible." It will be perceived that this is the section of the Code which authorizes the ordinary to grant leave to the administrator to sell the land of his intestate for the payment of debts, and the *only notice* which is required to obtain such leave is, that notice of the application shall be published once a week for four weeks before the hearing, in the gazette in which the county advertisements are published; that having been done, no other notice is required to make the order granting leave to sell the land, a legal and valid order for that purpose, for the simple reason that the law does not require any *other notice* in order to obtain leave to sell. What will be the effect of that order when the administrator seeks to recover the possession of the land from the heir, is an entirely different question. The administrator cannot sell the land for the payment of the debts of his intestate until he recovers possession of it from the heir, when the heir holds the same adversely to him: Code, section 2564. The 2486th section of the Code declares that "the administrator may recover any part of the estate from the heirs-at-law, or purchasers from them; but in order to recover lands it is necessary for him to show upon the trial, either that the property sued for has been in his possession, and, without his consent, is now held by the defendant, or that it is necessary for him to have possession for the purpose of paying the debts, or making a proper distribution. An order for sale, or distribution, granted by the ordinary after notice to the defendant, shall be conclusive evidence of either fact." The construction which we give to the 2559th and the 2564th sections of the Code is, that an order for leave to sell land by the ordinary, on the published notice, as required by section 2559, is a legal and valid order so far as the question of notice is concerned, and that no other notice than that

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required by that section is necessary to obtain leave of the ordinary for the sale of land by an administrator. That when such administrator brings his action to recover the possession of the land from the heir, as provided by section 2486, the order for the sale thereof, under the provisions of section 2559, will not be *conclusive* upon the defendant so as to prevent him from showing that there were no debts due by the intestate of the administrator, unless the defendant had *personal notice* of the granting of the order for leave to sell the land for the payment of the debts of the intestate. The words "after notice to the defendant," should be construed to mean *personal notice*, when it is sought to make the order of the ordinary *conclusive* upon him. To grant leave to sell the land of an intestate by an order of the ordinary for the payment of debts on the notice required by section 2559, is one thing, but to make the order *conclusive* upon the heir, is another and different thing. The fair and reasonable interpretation of these two sections of the Code is, that the ordinary may grant an order for leave to sell the land of an intestate for the payment of debts, as provided by section 2559, and such an order is legal and valid; but where the administrator seeks to recover the land from the possession of the heir, for the purpose of administering it for the payment of debts, under the 2486th section, that order granting leave to sell the land for the payment of debts, is not conclusive upon the heir, unless it be shown, that he had *personal notice* of the granting of the order, and in the absence of any proof of such personal notice, he may show that there were no debts due by the intestate at the time of her death. According to the view which we have taken of this case, the order of the ordinary granting leave to sell the land of the intestate, was a legal, valid order, which should not be set aside either in the court of ordinary or in the superior court, on the appeal trial, for want of notice; inasmuch as the published notice in the gazette, is all the notice which the statute requires to obtain an order for leave to sell the land of the intestate by the administrator. To hold that *personal notice* was necessary before an order could be ob-

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tained by an administrator for leave to sell the land of his intestate, would be to interpolate words into the statute, which the general assembly have not put there. If the defendant did not have any *personal notice* of that order, he will not be concluded by it, on the trial of the case, from showing that there were no debts due by the administrator's intestate, so as to make it unnecessary for him to recover the land, for the payment thereof. If the order of the ordinary granting leave to the administrator to sell the land of the intestate, was void for want of *personal notice* to the heir, then he could attack it for that reason, if it should be in his way on the trial of the ejectment suit, and there would have been no necessity for an injunction. It follows, therefore, from what we have already said, that there is no equity in the complainant's bill, he having an ample adequate remedy at law, and that the injunction was improperly granted.

Let the judgment of the court below be reversed.

BLECKLEY, Judge, concurred, but furnished no written opinion.

JACKSON, Judge, dissenting.

In this case my brethren and myself are agreed that under section 2486 of the Code, the notice to Howard, the heir, by Davis, the administrator, should have been personal notice to conclude him; but we differ on the point in what forum the judgment of the ordinary should be attacked. A majority of the court think that it may be done in the superior court on the trial of the ejectment; I think it can be done only in the court which rendered the judgment, and that is the court of ordinary. The bill was filed to suspend the trial of the ejectment until the motion to set aside, which was pending on appeal from the ordinary, could be heard, the ejectment standing first for trial on the docket. The necessity for the bill and the injunction depends, of course, on the issue whether the superior court, on the trial of the ejectment, can attack the judgment of the court of ordinary for irregularity in the no-

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Let the judgment of the court below be reversed.

BLECKLEY, Judge, concurred, but furnished no written opinion.

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tice given to Howard, the heir, that notice not having been personally given, but only given by *advertisement in the newspaper*. My brethren think it can do so. I think not.

The order granting leave to sell is a judgment: 7 *Georgia*, 559; 47 *Ibid.*, 202. The court of ordinary is a court of original, exclusive and general jurisdiction of the sale and disposition of the real property belonging to, and the disposition of, deceased persons' estates, and of all other matters and things relating to estates of deceased persons: Code, section 331; acts of 1855-6, page 147; 14 *Georgia*, 27; 24 *Ibid.*, 245. If a court of general jurisdiction in respect to the disposition and sale of real property, it had jurisdiction of this land to order its sale, and of the administrator and the heir to pass upon the necessity of the sale as between them; and its judgment on that subject, for any irregularity of notice or otherwise, cannot be collaterally attacked, but must be attacked in that court which rendered it, Code, section 3593; 13 *Georgia Reports*, 1; 14 *Ibid.*, 325; 30 *Ibid.*, 961. In *Tucker vs. Harris*, 13 *Georgia Reports*, 1, it is ruled distinctly that the court of ordinary is such a court, and its judgment is so to be regarded, and the present chief justice expressed his hearty concurrence in the decision, though having been of counsel he did not preside. If this judgment were void for want of jurisdiction of the person and subject matter, or for any other cause, then it might be attacked collaterally on the ejectment trial: Code, sections 3594, 3828. But is it void? My brethren concede that it is not. It is good, they say, to order the sale of this land, and they cite section 2559 of the Code to show its validity for that purpose. If valid for any purpose it is not void; and, therefore, it must be attacked in the court of ordinary which rendered it. Notice was given by publication, not personally. It is defective in the mode of the notice, in its irregularity, not void for want of jurisdiction; for the court had jurisdiction of the subject matter, the sale of the land, and of the persons, the administrator and the heir. My own opinion is that section 2559 of the Code is controlled by section 2564, and restricted as to all persons in possession holding ad-

versely to the estate, except the heir, who can hardly be said to hold adversely. I mean that no order can be passed by the ordinary to sell lands in possession of anybody except the heir, unless the lands be in the possession of the administrator; section 2564 prohibits it. It would be a vain, foolish thing to authorize the administrator, under section 2559, to sell what section 2564 forbade to be sold; and therefore the ordinary can order the sale of lands only in the possession of the administrator or of the heir. I construe the three sections together—2486, 2559 and 2564—and, taken together, they mean that the ordinary can order the sale of lands in the possession of the heir as well as of the administrator himself, but not in that of strangers holding adversely. Section 2559 requires only notice by publication; and such notice makes the judgment valid for the sale only, if the land be in the possession of the administrator. Section 2486 requires personal notice. It is not necessary in either case that the judgment should set out the notice or the kind of notice. The presumption is that the court did its duty and gave the right sort of notice if it granted the order or made the judgment. A court of limited jurisdiction may be constrained to show on the face of the judgment it renders its authority therefor; but it will be presumed that a court of general jurisdiction of the subject matter and persons did all things precedent to the judgment right, unless the contrary appear on its face. If it "carries its death wound there on its face," it is dead every where, and may be pronounced but a lifeless corpse by any court that looks at it. But if it seems to be alive, and only in view of some irregularity, as in the matter of the kind of notice, not seen on its person, but to be shown *aliunde*, it be sick unto death, then it must be killed, if it deserve death, by the court that gave it birth. Such, I think, is the plain meaning of the Code in the sections which make the courts of ordinary courts of general jurisdiction, and in those which regulate the mode and forum of attacking judgments: Code, sections 331, 3593, 3594, 3828. And such, it appears to me, have been the uniform decisions of this court. For authority that the order

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need not show on its face the facts necessary to give the court jurisdiction, see *Barnes vs. Underwood*, 54 *Georgia Reports*, 87. In that case the chief justice delivered the opinion, and said: "If this was an open question in this court, I should hold that the appointment of Underwood, as shown by the record from Hall, was made without authority of law, for the reasons stated in my dissenting opinion in *Davie vs. McDaniel*, 47 *Georgia Reports*, 195, and for the additional reasons urged on the argument by the counsel for the plaintiff in error in this case. But the majority of this court held in *Davie vs. McDaniel* that the judgments of the court of ordinary in this state, in matters connected with wills and the administration of estates, were judgments of courts of general jurisdiction, and that the necessary jurisdictional facts need not appear on the face of their proceedings. Such is, therefore, now the settled law in this state on that question until the general assembly shall declare what is the true intent and meaning of the 4114th and 4115th sections of the Code." By turning to the opinion in *Davie vs. McDaniel*, 47 *Georgia Reports*, 195, it will be seen that Mr. Justice MONTGOMERY carefully examined the decisions of this court from the beginning, and cited cases from the first volume of *Georgia Reports* down, to the effect that courts of ordinary, whatever they may have been, are courts of general jurisdiction, and their judgments entitled to full authority as such. I confess that the 4115th section of the Code does seem to provide that the order should recite the names of persons notified personally under the preceding section; but *stare decisis* is a good rule, to which the chief justice, in *Barnes vs. Underwood*, yielded, and I bow to that decision now. Further, section 4114 of the Code provides that the sheriff shall serve the party to be notified personally with the order of the ordinary. The presumption is that the sheriff did this and made his return, because the presumption is that the court would not grant the order to sell until the law had been complied with. At common law, such return of the sheriff was conclusive, but by our Code it may be traversed and set

aside: Code, section 3340. But how and where traversed and set aside? Under the recent rulings of this court, it must be done not only in the court where rendered, but it must be done by traverse of the return, to which traverse the sheriff must be a party: See *Maund vs. Keating*, 55 *Georgia Reports*, 396, and *Lamb vs. Dozier*, *Ibid.*, 677.

In my judgment, the concurring opinion of Judge McCAY, in *Davie vs. McDaniel*, on page 208 of 47 *Georgia Reports*, embodies the whole law in few words, "*multum in parvo*." Those words are these: "The rules prescribed by the statute regulating the mode of doing business by the courts of ordinary ought always to be conformed to; and if they be not conformed to, the judgments are irregular, but they are not for that reason void. An irregular judgment cannot be attacked for that reason before another tribunal; to justify such an attack, the judgment must be void." To attack this judgment in the case at bar, I think, for the foregoing reasons, it was necessary to move in the court of ordinary, as the defendant in error did, and as the ejectment would be tried before his motion on appeal could be heard to set aside the judgment, I think the bill and injunction necessary, and that the judgment sustaining the bill and granting the injunction should have been affirmed: See *Stell vs. Glass*, 1 *Kelly*, 486; *Clements vs. Henderson*, 4 *Georgia Reports*, 148; *McDade vs. Burch*, 7 *Ibid.*, 559; *Tucker vs. Harris*, 13 *Ibid.*, 1, (page 16 particularly;) also, 14 *Ibid.*, 27; 24 *Ibid.*, 245; 15 *Ibid.*, 346; 3 *Kelly*, 110; 30 *Georgia Reports*, 961; 50 *Ibid.*, 231; 14 *Ibid.*, 325, and dissenting opinion of McCAY, judge, in *Fischesser vs. Thompson*, 45 *Ibid.*, 459.

GEORGE W. MCCLURE *et al.*, plaintiffs in error, vs. JAMES M. SMITH, governor, defendant in error.

1. When the contents of pleadings are recited in the bill of exceptions differently from what they actually are in the pleadings themselves, as copied out at full length in the record, such recitals will be disregarded, and the record will be deemed correct.

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2. The sheriff, after making an arrest under a bench warrant for misdemeanor, having taken bail, approved the bond, and discharged the prisoner, has no power subsequently, although he has not returned the bond to the clerk's office, to stipulate with the sureties, for their protection, to add other sureties to the bond; and his failure to comply with such an undertaking is no bar to a judgment of forfeiture in behalf of the state.

Practice in the Superior Court. Bill of exceptions. Criminal law. Bond. Bail. Sheriff. Before Judge KNIGHT. Union Superior Court. May Term, 1875.

Reported in the opinion.

THOMAS F. GREER, for plaintiffs in error.

C. D. PHILLIPS, solicitor general, for the state.

BLECKLEY, Judge.

1. The complaint is that a plea was stricken. The contents of the plea are misrecited in the bill of exceptions, and it was upon the misrecitals that counsel for plaintiffs in error seemed to rely, chiefly, in his argument before this court. The sole authority to which he referred was 6 *Georgia Reports*, 202, which relates to incomplete bonds, or bonds not finally and unconditionally delivered. That authority might be pertinent if the plea in the present case was what the bill of exceptions represents it to be; but it is not. The plea, as set out at full length in the transcript of the record, ought to govern and will govern, and it alone will be looked to. The copy there found is to be deemed complete and correct. It is not the office of the bill of exceptions to give either a copy or a summary of the pleadings, and when it professes to do either, it is subject to be checked, or even wholly contradicted, by the record: 44 *Georgia Reports*, 620.

2. The bond shows on its face that an arrest had been made under a bench warrant for the offense of adultery, and that the obligation of the bail (plaintiffs in error) was that their principal should appear at the court and not depart without leave of the court. On *scire facias* brought to en-

force the bond, they pleaded, not that it was incomplete, or that it had never been delivered, or that it was not their act or deed, or that the condition had been performed, but that they signed it with the understanding that it was to be void if the principal appeared next day; that he did so appear and desired them not to *lift* the bond but to continue to stand, promising that he would get other signatures to it; that they agreed the bond might remain theirs provided this promise were complied with; that the sheriff, who then had the bond in his possession, said he had authority to sign the names of other good sureties, (specifying them) and would do so, and that plaintiffs in error might go home and all should be right; and that, relying upon these promises, and fully believing that the sheriff would see them complied with before returning the bond into court, they, the plaintiffs in error, agreed that the bond might remain theirs. This is the substance of the plea, which, on motion of the state's counsel, was stricken as not presenting any legal defense in behalf of the bail.

The sheriff was competent to take the bond and admit his prisoner to bail: Code, section 4727. He had authority to approve the sureties, and the bond shows on its face that he did approve them. It is plainly inferable from the plea that this bond was made complete in every particular, and that the prisoner was discharged under it and appeared under it on the next day. The law gives the sheriff no power over such a bond after he has taken and approved it, and after he has discharged the prisoner in consequence thereof, except to return it to the court or into the clerk's office. He was no longer the agent of the state for any other purpose. The bail could not extinguish or modify their liability except by surrendering their principal, and this they neither did nor attempted. They chose to retain him in their friendly custody. Instead of performing the stipulations of their written contract, they trusted to their principal and to the sheriff to add new parties. In this undertaking the sheriff acted outside of his official functions; and if he became the agent of any body, it was of

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the plaintiffs in error themselves. They trusted him, and if he has injured them by proving unfaithful, they must look to him for redress. For myself, I am confident that so far from the public being bound by the sheriff's promise to strengthen the bond, it would have been a clear violation of his official duty to have suffered any change made in the bond or in the parties. It was the state's document and not his. After once became complete as a contract, he had no right to tamper with it.

The judge below was right in striking the plea, and judgment is affirmed.

SARAH SAUNDERS, administratrix, plaintiff in error, vs.
JAMES W. BELL, executor, defendant in error.

Where, at an administrator's sale, property is bid off and the bidder refuses to take it, and the administrator elects to resell and proceed against the first purchaser for the deficiency arising from such sale, he must resell the property as soon as practicable, and if he delay, without the consent of the bidder, for twelve months, on the ground of stringency of the times, such delay will forfeit his right to recover, and a non-suit will be properly awarded.

Administrators and executors. Sales. Before Judge CLARK.
Webster Superior Court. September Term, 1874.

Reported in the opinion.

B. S. WORRILL; J. L. WIMBERLY, for plaintiff in error.

W. A. HAWKINS, for defendant.

JACKSON, Judge.

The administratrix offered for sale certain lands. Bell, the defendant, bid them off at a certain price, and afterwards, for reasons not necessary in this opinion to be considered, declined to take them. The land was offered again for sale

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twelve months after the first sale and first bid without the assent of Bell, and knocked off at a certain other price considerably less than Bell's bid at the first sale, and suit was brought against Bell for the difference. After the plaintiff proved the court awarded a non-suit, among other reasons, because the administratrix, without the consent of the defendant had not put up the land for resale until twelve months had elapsed from the time of the first sale. The excuse offered by the administratrix was the stringency of the money market and hardness of the times.

We think that the court properly granted the non-suit. The land should have been offered for sale again as soon as practicable. Any unreasonable delay, without the assent of the bidder, would put it in the power of the estate to speculate upon the bidder by selecting such time to resell as would be to the interest of the estate and adverse to that of the bidder. The right of recovery turns on the loss to the estate by reason of the failure of the bidder to comply with his contract, and that loss must be ascertained by the resale as soon as it can be reasonably done. If the bidder, on the day of sale, refuses to comply before the crowd disperses and the hours of sale terminate, that day is the proper time to resell; if that cannot be done, just so soon as the property can be re-advertised after notice of refusal to comply with the terms of sale. But whenever the administratrix takes the whole arrangement out of the co-operation of the bidder, and puts off the sale, for reasons that she alone judges to be sufficient, to a period of twelve months, she forfeits all right of recovery for the difference between the two bids. It will be seen that the statute gives her the option to sue at once for the whole bid, rendering compliance on her part, or to resell, and sue for the difference. When she elects the latter course, as in this case she has done, she must resell as soon as practicable: Code, section 3655. This view of the law controls this case and makes it unnecessary to consider the other points made in the brief.

Judgment affirmed.

 McDaniel vs. Edwards.

JULIET MCDANIEL, plaintiff in error, vs. MARION C. EDWARDS, defendant in error.

1. After a sale of land for distribution by an executor, under an order of the court of ordinary, it stands discharged of prior judgment liens against one of the legatees, whose interest therein, under the will, was one equal undivided share with several other legatees.
2. A mere general objection to testimony will not be considered in the supreme court, no ground of objection being stated in the record or in the bill of exceptions: *47 Georgia Reports, 99.*

Administrators and executors. Judgments. Practice in the Supreme Court. Evidence. Before Judge CRAWFORD. Muscogee Superior Court. November Term, 1875.

Reported in the opinion.

L. T. DOWNING, for plaintiff in error.

LITTLE & CRAWFORD, by brief, for defendant.

BLECKLEY, Judge.

A will was made in 1841, directing that property, real and personal, be kept together in the possession of testator's wife during her life or widowhood, then to be equally divided between his ten children, one of whom was John W. Edwards. The testator died in the same year. His wife died in 1869, at which time some personal property and a tract of land covered by the will remained undivided and unadministered. No debts were then outstanding, and the legatees were of full age. Some of them had died leaving minor children. In 1870, John W. Edwards, as executor, sold the land under an order from the court of ordinary, for distribution. It was purchased by the present claimant, and the executor conveyed it to him by deed and gave him possession. There was, at that time, a judgment against John W. Edwards, not as executor, but individually, in favor of the plaintiff, Juliet McDaniel, which was rendered in 1868. Execution founded thereon was levied, in March, 1874, upon an undivided one-

eight interest in the land, as the property of John W. Edwards. A claim was interposed, and on the trial, the jury, under the evidence and charge of the court, found in favor of the claimant.

1. The main question argued before us, was whether the sale and conveyance by the executor discharged the land from any lien the judgment may have had upon his interest in it as legatee. No case heretofore decided by this court covers this precise question. It has been held that a sale to pay debts, by the representative of an estate, divests the lien of judgments rendered against the decedent in his lifetime: 45 *Georgia Reports*, 585; 46 *Ibid.*, 389; 49 *Ibid.*, 274. Whether a sale for distribution only would have a like effect is yet open. Even delivery to the heir in the course of administration, places land beyond the reach of a judgment *subsequently* rendered against the administrator upon a debt of the intestate, unless there be equitable facts on which the creditor may proceed: *Jones vs. Parker*, 55 *Georgia Reports*, 11. In *Wilkinson & Wilson vs. Chew*, 54 *Georgia Reports*, 603, the creditor of an heir or legatee whose reversionary or remainder interest in the particular property is clearly defined, was said to be entitled to proceed by levy and sale pending the life estate. In *Clarke vs. Harker*, 48 *Georgia Reports*, 596, the executor was allowed to claim, and thus prevent interference by judgment creditors of certain of the legatees, with regular administration. The opinion of the court in this last case presents some of the difficulties in the way of subjecting to levy and sale shares in detached parts of undivided estates. Doubtless further judicial elaboration, or some legislative act, will be requisite to give full development and consistency to the law of this subject. It might not be easy to tell, with absolute certainty, whether before the executor sold in the present case, his interest in this particular land as legatee was so clearly defined as to make it the subject of ordinary levy. If the land had been all the property that was unadministered, and there was no inequality among the legatees in the prior distribution, then there would seem to be no obstacle to treating him

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as a mere co-tenant with the other legatees, and in selling his interest accordingly. But here the executor had administered the land before the levy. For that purpose he was the agent of the law. He administered under a judgment of the court of ordinary, the court clothed by law with jurisdiction over estates, testate and intestate. The purchaser bought the land as the property of the testator, against whom there was no judgment, not as the property of the legatee, the judgment debtor. The title of the purchaser, therefore, goes back behind the lien of this judgment and cuts it off. Such, we think, is a better view of the matter, and we so adjudge: Code, sections 2246, 2483; 27 *Georgia Reports*, 125.

2. The objection to the evidence is too general for us to deal with. The motion for new trial discloses no ground of objection, nor does the bill of exceptions or any other part of the record: 47 *Georgia Reports*, 99. It was not insisted in the argument before us that the judge charged the jury in a way to encroach on their functions, nor was attention called to any defect in the executor's deed.

Judgment affirmed.

JAMES K. P. KEATON, plaintiff in error, vs. N. & A. F. TIFT, defendants in error.

1. Where the proprietor of a farm vests in an assignee, for value, the right to let a farm and collect the rent arising out of said farm, and such assignee does let the same to a tenant under him:

Held, that such an assignee may distrain for the rent.

2. Where part of property levied on is subject and part not subject under the facts, the judgment will be reversed and a new trial granted, unless the levy is dismissed in respect to that not subject.

Landlord and tenant. Distress warrant. Practice in the Supreme Court. Before Judge HALL. Dougherty Superior Court. October Term, 1875.

Reported in the opinion.

STROZER & SMITH ; W. F. JONES, for plaintiff in error.

D. H. POPE, for defendants.

JACKSON, Judge.

The Messrs. Tift sued out a distress warrant against Billingslea, and levied it upon a crib of corn containing some one hundred and nineteen bushels and nine hundred bushels of cotton seed. Keaton claimed the property levied on. Keaton had rented the land to Billingslea for the year 1874 and preceding years. Subsequently Keaton and the Tifts, between whom there had been some business transactions, settled their differences, and this land rented to Billingslea was turned over to the Tifts to control and collect the rent thereof for the year 1874, and to have an interest therein for 1875. The Tifts re-rented to Billingslea for 1874 at twelve bales of cotton for rent and the replacement of corn used by the tenant. When Keaton first rented to Billingslea, Billingslea was to return to him, Keaton, nine hundred bushels of cotton seed and three hundred bushels of corn which was on the place when he first rented in 1867. At the close of 1874 Keaton took possession of the place. Billingslea turned over to him the nine hundred bushels of cotton seed delivered and a crib of three hundred bushels of corn. The one hundred and nineteen bushels of corn levied on was not so turned over to him, but was claimed also by him.

The jury found all subject, the one hundred and nineteen bushels of corn and the cotton seed.

A new trial was moved for on two grounds: First, because the Tifts were not landlords, and could not distrain; and second, because Keaton had the superior right to the property, as it was returned to him as landlord pursuant to his first contract of rent.

1. We think the Tifts were, by the contract with Keaton and their subsequent renting the place with his assent, entitled to distrain. They became the landlords. It de

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not lie in Keaton's mouth to deny it. He made them so by his contract for value with them. Billingslea does not dispute it. If he did, he, too, would be estopped, for he rented from them.

2. We think that the one hundred and nineteen bushel of corn was subject to the distress warrant. It had not been delivered to Keaton when levied on. This one hundred and nineteen bushels, as it was not delivered to Keaton, seem to have been left by Billingslea for the Tifts. At all events, it was subject to their claim. In regard to the cotton seed, we think otherwise. It was turned over to Keaton in compliance with Billingslea's contract with him for previous rent. The Tifts had got their twelve bales of cotton and their corn, and we think the right to the cotton seed was in Keaton. Therefore we reverse the judgment and grant a new trial, unless the plaintiff will dismiss his levy on the cotton seed; in which event we affirm the judgment.

HENRY C. WAYNE, administrator, *et al.*, plaintiffs in error,
vs. THE MAYOR AND ALDERMEN OF THE CITY OF SAVANNAH, defendants in error.

1. As matter of public policy, founded on the exigencies of government, municipal corporations must have present command of their current revenues. Property holders who have paid, whether voluntarily or by coercion, illegal taxes in former years, have no right to set off (by injunction or otherwise) such payments against executions issued for the taxes of later years.
2. The remedy of injunction to restrain the collection of municipal taxes upon real estate, regularly assessed in pursuance of general ordinances to raise revenue for the current wants of the city, which ordinances are attacked for the sole reason that they do not burden all taxable property alike, is subject to the sound discretion of the chancellor; and where he has exercised his discretion by refusing the injunction, and the grounds of his judgment have a direct bearing upon nearly the entire mass of property over which the taxing power is exercised, and involve, therefore, the whole system of municipal finance, this court will not, for any reason, disturb as wise and conservative an administration of the injunction law.

Municipal corporations. Taxes. Injunction. Before Judge OMPKINS. Chatham County. At Chambers. February 1875.

In November, 1875, Wayne, as administrator upon the estate of Ferrill, and others owning real estate in the city of Savannah, filed their bill against the mayor and aldermen of such city, making, in brief, the following case :

Their real estate has been assessed for taxation by said corporation for the years 1874 and 1875, at the rate of two and a quarter per cent. per annum. For the years 1870 and 1871, they were assessed and taxed upon said property one and three-quarters per cent., and for the years 1872 and 1873, at the rate of two per cent. These taxes were paid to the extent set forth in schedule annexed to the bill, immaterial here. The payment of this money was coerced from them under the powers vested in the defendant to fine and to issue executions, &c. For the purpose of enforcing payment of the taxes assessed for the years 1874 and 1875, the defendants have issued executions, had them levied, and have caused complainants' property to be advertised for sale.

Complainants submit that all of the aforesaid taxes from the year 1870 to the year 1875, inclusive, are unconstitutional in this: that in the year 1870 complainants' real estate was taxed one and three-fourths per cent., while stocks, bonds, moneyed capital, etc., were taxed only one-fourth of one per cent., and in like manner discriminations were made during the following years, and are now made in the tax ordinance of 1875, against real estate in said city, in favor of stocks, bonds, moneyed capital, etc.

They further submit that the tax ordinances for the years 1874 and 1875 are illegal for the further reason, that while every one owning household and kitchen furniture over the value of \$300 00, is taxed upon said furniture, yet those owning less than \$300 00 are exempted, thereby decreasing the amount of taxable property in said city, and thus increasing the rate of taxation on their real estate.

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They further submit that the tax assessed for the year 1872 is illegal is this: that stocks, bonds, etc., of the value of millions of dollars are exempted from taxation, not in the exercise of a sound discretion, but for the purpose of discriminating in favor of personal property against real estate.

They further submit that the taxes assessed for the years 1874 and 1875, and previous years, are unconstitutional and void in this: that while the real estate of complainants is taxed from one and three-fourths to two and one-fourth per cent. per annum, real estate to the value of millions of dollars is unlawfully exempted from taxation of any character.

This last position is sought to be maintained by a history of what are known as the "ground rent lots," immaterial here in view of the decision.

Complainants pray that an account may be taken of the amount of illegal taxes coerced, exacted and received from them from the year 1870 to the filing of the bill; that such illegal collections may be applied to the payment of any legal taxes now assessed, or hereafter to be assessed against complainants until exhausted; that if the defendants decline to apply the same in that way, then that they be decreed to pay them over to complainants; that the defendants be enjoined from further proceeding with the aforesaid tax executions; that said defendants be enjoined from assessing taxes against complainants' property, unless they shall assess and tax the said stock, bonds, capital, furniture and ground rent lots at the same rate of taxation. They also pray discovery and the writ of *subpoena*.

The defendants demurred and answered. The grounds of demurrer were as follows:

- 1st. Want of equity in the bill as a whole.
- 2d. Multifariousness.
- 3d. To that part of the bill which sought to recover the taxes paid for 1870-'1-'2-'3, for want of equity.
- 4th. To so much of the same part of the bill as related to payments made more than four years before the filing of the bill.

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The answer, under the defendants' corporate seal, consisted, substance, of three parts :

1st. Referring to the organic law from which the city derived its power to tax, and attaching a copy of the ordinance of 1875, it insisted that the ordinance was not in conflict with the constitutional rule of uniformity in *ad valorem* taxes upon property taxed ; and that in the matter of exemptions the discretion exercised was in accordance with the law and not subject to the control of the judiciary.

2d. It admitted that the ordinance for 1874 was in conflict with the constitutional rule, in requiring a tax of two and a quarter per centum for real property, and only one-fourth of one per centum for certain other kinds of property ; but denied that the executions against the complainants for the taxes for that year were proceeding only for the amount of one-fourth of one per centum of the value of the real property of the complainants.

3d. It admitted that the ordinances for 1870-'1-'2-'3 had been in conflict with the constitutional rule ; but, explaining the history of the system of taxation in the city as above set forth, insisted that all the taxes collected for those years had been expended as fast as received in carrying on the municipal government, which could not be supported without taxes at some rate and upon some system, and that it would be oppressive to the corporation which had collected, and to the people generally who had paid the taxes for those years in good faith for that purpose, to require them to be refunded now ; and that all such taxes paid by the complainants had been paid by them voluntarily, with full knowledge or opportunity to know the law, and without any artifice or deception on the part of the defendants to induce them to pay, and that the complainants had the same means then as now of discovering the alleged illegality, and the same remedies at law and equity.

Upon the application for injunction and the demurrer, the argument was heard upon two different days with an interval of a week. On the second day, the complainants filed an

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unverified amendment to their bill, in which they made two new allegations—one that the defendants knew continuously from 1870 that the tax ordinances were illegal; the other that it had used artifice in submitting to an injunction to restrain the collection of a tax, and inducing the persons obtaining such injunction to withhold from the public the fruits of such submission.

The chancellor, on the 5th of February, 1876, ordered that the demurrer be wholly sustained, and the injunction wholly refused, as to all of the said bill except that part which prays for the writ of injunction to restrain the defendants from proceeding to collect the taxes assessed on the real estate of the complainants for the year 1874; and as to that part of the said bill so excepted, it is ordered that the writ of injunction do issue to restrain the defendants from proceeding to collect any more of the taxes required for the real property of the complainants for the year 1874, than will be equal to one-fourth of one per centum of the assessed value of the property, and that the demurrer to that part of the said bill be sustained only to the extent thus indicated.

To this judgment complainants excepted.

R. R. RICHARDS, for plaintiffs in error.

WILLIAM S. BASINGER, for defendants.

BLECKLEY, Judge.

This case was brought up under the statute which provides for the expeditious review of orders granting or refusing injunction. The decision complained of was made whilst the present term of this court was in progress. The ultimate question for us, on this writ of error, is, whether the judge abused his discretion in denying a more comprehensive injunction than the one he granted. We hold, for the reasons indicated in the head-notes, that he did not. Should the complainants think proper to bring their bill to a final hearing in the court below, it may then be necessary to go deeper into

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ne or all of the grave questions which underlie their attack on the revenue system of the city; but it would be premature to do so now.

Judgment affirmed.

HARDIN & BLAKEMAN, plaintiffs in error, *vs.* **ALEXANDER B. HANNA**, defendant in error.

his court will not control the discretion of the presiding judge in granting a new trial on the ground that the verdict is decidedly against the weight of the evidence, especially when the motion is fortified by many affidavits to newly discovered evidence, although that evidence be somewhat cumulative, and though some of it tends to contradict and impeach one of the plaintiffs who testified in the case, when the defendant made affidavit that the plaintiffs surprised him by denying the contract set up in his equitable plea, alleging that said plaintiffs had often admitted its truth to him, and he was not, in consequence of such admission, prepared to impeach him on the trial.

New trial. Before Judge McCUTCHEN. Dade Superior Court. September Term, 1875.

Reported in the opinion.

DABNEY & FOCHE; **R. H. TATUM**, for plaintiffs in error.

E. D. GRAHAM; **J. E. SHUMATE**; **JOHN G. HALE**, for defendant.

JACKSON, Judge.

This was a suit brought by the plaintiffs against the defendant to recover \$6,960 00. The declaration contained two counts—one sets out the items of the account for building a hotel at Sulphur Springs, DeKalb county, Alabama; the other was on a written contract which specified in what manner the work should be done, the number of rooms, halls, &c.; the time when to be completed, and in what way payment was to be made, particularly that it was to be made in

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part in a tract of land in Dade county, Georgia, at the price of \$5,000 00. To this action the defendant pleaded, among other things, an equitable plea to the effect that plaintiff could not carry on or complete the work on the hotel for want of funds; that in consequence thereof, at their special request, he indorsed their paper for some \$2,000 00 at the City National Bank, Chattanooga, Tennessee; that these notes were protested for non-payment, and are still unpaid; that he was agreed between plaintiffs and himself that defendant should retain the title to the Dade county land until this paper, which he had indorsed, was paid by the plaintiffs, and he saved harmless from this indorsement. On the trial the plaintiffs read to the jury the written contract, and proved the completion of the work, and the acceptance of the hotel by the defendant; and though the building was not completed at the time specified in the contract, that that matter was settled by the rents of the Dade place for 1874; that they had demanded title to the Dade lands, which defendant had refused to make. The defendant testified to the parol agreement, the plaintiffs denied it; and there was other evidence *pro* and *con* in relation to this parol agreement. The jury returned a verdict of \$5,000 00 against defendant, with a stay of the execution for as much thereof as was necessary to protect defendant against his indorsement of plaintiffs' paper at the bank at Chattanooga until plaintiffs should pay it. The defendant moved for a new trial on the grounds that the verdict was against the law and the weight of the evidence, and on account of newly discovered evidence. The court granted the new trial, and the plaintiffs excepted, and brought the case here, and assigned for error the grant of the new trial.

This court has repeatedly ruled that it will interfere with great reluctance in the grant of a new trial by the court below, and will never do so except in extreme cases, when that court has grossly abused the discretion with which the law invests him: 49 *Georgia Reports*, 120, 588, and many others. In looking over this voluminous record and examining the evidence, we cannot say that the court below has abused his

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ne or all of the grave questions which underlie their attack on the revenue system of the city; but it would be premature to do so now.

Judgment affirmed.

ARDIN & BLAKEMAN, plaintiffs in error, vs. ALEXANDER B. HANNA, defendant in error.

is court will not control the discretion of the presiding judge in granting a new trial on the ground that the verdict is decidedly against the weight of the evidence, especially when the motion is fortified by many affidavits to newly discovered evidence, although that evidence be somewhat cumulative, and though some of it tends to contradict and impeach one of the plaintiffs who testified in the case, when the defendant made affidavit that the plaintiffs surprised him by denying the contract set up in his equitable plea, alleging that said plaintiffs had often admitted its truth to him, and he was not, in consequence of such admission, prepared to impeach him on the trial.

New trial. Before Judge McCUTCHEN. Dade Superior Court. September Term, 1875.

Reported in the opinion.

DABNEY & FOCHE; R. H. TATUM, for plaintiffs in error.

E. D. GRAHAM; J. E. SHUMATE; JOHN G. HALE, for defendant.

JACKSON, Judge.

This was a suit brought by the plaintiffs against the defendant to recover \$6,960 00. The declaration contained two counts—one sets out the items of the account for building a hotel at Sulphur Springs, DeKalb county, Alabama; the other was on a written contract which specified in what manner the work should be done, the number of rooms, halls, &c.; the time when to be completed, and in what way payment was to be made, particularly that it was to be made in

part in a tract of land in Dade county, Georgia, at the price of \$5,000 00. To this action the defendant pleaded, among other things, an equitable plea to the effect that plaintiffs could not carry on or complete the work on the hotel for the want of funds; that in consequence thereof, at their special request, he indorsed their paper for some \$2,000 00 at the City National Bank, Chattanooga, Tennessee; that these notes were protested for non-payment, and are still unpaid; that it was agreed between plaintiffs and himself that defendant should retain the title to the Dade county land until this paper, which he had indorsed, was paid by the plaintiffs, and he saved harmless from this indorsement. On the trial, plaintiffs read to the jury the written contract, and proved the completion of the work, and the acceptance of the hotel by the defendant; and though the building was not completed at the time specified in the contract, that that matter was settled by the rents of the Dade place for 1874; that they had demanded title to the Dade lands, which defendant had refused to make. The defendant testified to the parol agreement, the plaintiffs denied it; and there was other evidence *pro* and *con* in relation to this parol agreement. The jury returned a verdict of \$5,000 00 against defendant, with a stay of the execution for as much thereof as was necessary to protect defendant against his indorsement of plaintiffs' paper at the bank at Chattanooga until plaintiffs should pay it. The defendant moved for a new trial on the grounds that the verdict was against the law and the weight of the evidence, and on account of newly discovered evidence. The court granted the new trial, and the plaintiffs excepted, and brought the case here, and assigned for error the grant of the new trial.

This court has repeatedly ruled that it will interfere with great reluctance in the grant of a new trial by the court below, and will never do so except in extreme cases, when that court has grossly abused the discretion with which the law invests him: 49 *Georgia Reports*, 120, 588, and many others. In looking over this voluminous record and examining the evidence, we cannot say that the court below has abused his

retion, or that this is, in any sense, an extreme case. On the contrary, we think that the weight of the evidence, as the jury stood on the hearing before the jury, was with the defendant and against the verdict; but if there was any doubt on the subject, we think the numerous affidavits to the point newly discovered testimony remove that doubt. The deposition of the cashier of the bank is proof positive of the truth of the parol agreement alleged in the equitable plea of the defendant, and we think it demonstrates a very substantial fact and is not wholly cumulative, while the affidavits of several witnesses swearing to the fact that Hardin, one of the plaintiffs, said to them that the parol agreement had been made, justify the surprise of the defendant at his denial of the agreement on the trial. Looking at the evidence before the jury, in connection with these depositions on the motion for a new trial, an impartial mind is forced to the conclusion that the equitable plea of the defendant rests on truth and should be sustained. The argument for the plaintiffs before the jury is that the defendant is not injured by the verdict, because there is a stay of execution in respect to the amount of the notes he indorsed for plaintiffs until they pay those notes; but it must be borne in mind that interest is accumulating every day on this protested paper, that the inability of plaintiffs to pay it shows their precarious, and perhaps insolvent, pecuniary condition, and defendant may lose by them at last on this protested paper. It must be remembered, too, that by the contract payment for building the hotel was to be in the Dade county land, in part, and that land was to be taken at the agreed price of \$5,000 00. The facts show that this land has depreciated in value and is not now worth that sum. There is a great difference between paying a debt in property and paying it in money, and if the property has depreciated the difference is still greater. It cannot be said in reply that the defendant refused to make title to this land to plaintiffs and therefore has nobody to blame but himself. He refused to make the title because he was to hold it as collateral security until plaintiffs paid the notes which he had indorsed. They

 Turner vs. Carroll.

have not paid those notes and have no right to demand title to the land until they do so. The whole equity of this case depends therefore on the truth or falsity of defendant's equitable plea: if false, of course the verdict does not hurt him but if true, he is greatly wronged thereby. The testimony before the jury tends to establish its truth, the newly discovered evidence would seem to put it beyond cavil, and therefore agree with the court below in granting him another trial on all the testimony. No permanent harm can result to the plaintiffs if their case be grounded on the truth; if not, they ought to fail.

Judgment affirmed.

JAMES H. TURNER, plaintiff in error, vs. JESSE W. CARROLL, defendant in error.

When a judgment refusing a new trial is reversed by the supreme court, the plaintiff in error, as soon as the *remittitur* is returned to the court below, is entitled to a judgment for costs incurred in the supreme court: Code, section 4290. And this right is not affected by instructions contained in the judgment of reversal, to the effect that a new trial will still be refused if the defendant in error will consent to certain terms, although he does consent to the prescribed terms at the time the *remittitur* is entered.

Costs. Judgments. Practice in the Supreme Court. Before Judge HALL. Rockdale Superior Court. October Term, 1875.

A *remittitur* from the supreme court, in the case of *Carroll vs. Turner*, reversing the judgment of the court below refusing a new trial, but directing that such new trial should still be refused if the defendant in error complied with certain conditions, was made the judgment of the superior court by an order reciting that the defendant in error had accepted the terms stated. Counsel for plaintiff in error in that case moved for judgment for costs incurred in the supreme court. The motion was allowed and the defendant excepted.

Woolfolk vs. The Macon and Augusta Railroad Company.

A. C. McCALLA, by CLARK & PACE, for plaintiff in error.

A. C. PERRY, for defendant.

BLECKLEY, Judge.

On writ of error, this court reversed a judgment refusing a new trial, but added instructions to the court below to refuse the new trial still, if the defendant in error would consent to certain prescribed terms. When the *remittitur* was entered in that court he accepted the terms. The court, nevertheless, permitted the plaintiff in error to take judgment for the costs incurred in this court.

The Code, section 4290, applies to all judgments of reversal. In this case there was such a judgment in express terms. The court below had refused a new trial unconditionally. The unconditional refusal was reversed, and a conditional refusal substituted by instructions. Acceptance of the prescribed terms did not change the reversal into an affirmance. The defendant in error lost his case here; the judgment rendered in his favor below was found to be erroneous, and to purge it of error, his adversary had to incur the costs now in controversy. He was entitled to get them back.

Judgment affirmed.

THOMAS J. WOOLFOLK, plaintiff in error, vs. THE MACON
AND AUGUSTA RAILROAD COMPANY, defendant in error.

1. Though in all cases where stock is killed by a railroad, even in a pasture which encloses the road, the presumption of negligence is against the company, and the burden is upon the company to show the absence of negligence and that the accident was unavoidable; yet, when evidence on that subject is before the jury, and the law has been correctly given in charge, and the jury has found for the company, this court will not control the discretion of the judge who presided in the court below in refusing to set aside the verdict and grant a new trial.

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2. When the plaintiff in error does not furnish in the record the entire charge of the court below, this court will presume that the circuit court charged correctly, if the contrary be not manifest from the portions of the charge given and excepted to.
3. A request to charge to the effect "that the failure to keep the right of way clear of bushes is negligence on the part of the road and its employees, and if the cow was killed by the failure to see her on account of the bushes, you should find for the plaintiff," was properly refused; because if such charge had been given, it would have taken the question of negligence from the jury, and left it entirely to the court; "negligence is a question for the jury; the judge has no right to determine what constitutes negligence:" *34 Georgia Reports, 330.*

Railroads. Charge of Court. Practice in the Supreme Court. Before Judge BARTLETT. Jones Superior Court. October Term, 1875.

Reported in the opinion.

HARDEMAN & JOHNSON, by WALTER M. JACKSON, for plaintiff in error.

WHITTLE & GUSTIN, by C. L. BARTLETT, for defendant.

JACKSON, Judge.

This was an appeal from the justice's court to the superior court of the county of Jones, on the question of the liability of the railroad company for killing a cow belonging to the plaintiff.

It appears from the record that the plaintiff had four or five hundred acres of land enclosed by fence, lying on both sides of the railroad; that where the fence crossed the road cattle gaps were constructed; that this land was used as a pasture at the time the cow was killed, and that she was killed within the enclosed pasture. It also appeared that some bushes were left standing within the right of way of the company, contrary to a regulation thereof, and it was attempted to be proved that the engineer failed to see the cow on account of the bushes. It was also in evidence that a public crossing

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on the road outside of this
ce thereof, and that the defenda

whistle and check his train on

that the cow was killed some sixty feet

in the enclosed field used as a pasture.

The jury, under the charge of the court, found for the de-
dant, the engineer having sworn that he could not see the
; that he was using all diligence; that the killing was
avoidable; that he could not have seen her on account of
sense, even if the bushes had been out of the way.

The plaintiff moved for a new trial on the ground that the
rt erred in refusing to charge that "the failure to keep the
ght of way clear of bushes is negligence on the part of said
ad and its employees, and you should find for the plaintiff,
the cow was killed by the failure to see her on account of
e bushes;" and on the further ground that the verdict was
ainst the law and the evidence. The court refused the new
ial, and this is the error assigned.

We think that the court properly refused the request. It
ould have made the court say to the jury what was negli-
ence, and would have commanded the jury, thereupon, to find
r the plaintiff. The question of negligence is for the jury,
clusively for the jury; had this charge been given, it would
ve been taken from them and been controlled exclusively
y the court. This court has often held that this question of
egligence is for the jury alone. It is enough to refer to the
se of *Wright vs. the Georgia Railroad and Banking Com-*
any, where the fact proven was that an axle of the car was
o short. It was held incompetent for the court to tell the
ry, even that that fact constituted such negligence as to re-
uire a verdict for the plaintiff: 34 *Georgia Reports*, 330. It
ould have been improper, therefore, to give this request as
ritten.

The charge of the court, as excepted to, submits the ques-
on of negligence to the jury, telling them that the burden
on the railroad company to show its absence and to show
at the accident was unavoidable. Even if the cow had not

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2. When killed in the pasture, crossing the road as the enclosed field did, we think that this gives the law substantially to the jury. Besides, the presumption is that the court supplied omissions, if the whole charge be not set out in the record, as to show affirmatively that the court erred in leaving out some important principle of law. As far as it is set out, the charge and refusal to charge appear to us correct; and we presume that the court charged that the presumption in respect to negligence was against the road, and that the jury might consider all the facts and circumstances in respect to the alleged negligence and find as they believed the truth to be. Assuming that the law was so given to the jury, we have often ruled that this court will not control the discretion of the circuit judge in refusing to grant a new trial when there is enough testimony to sustain the verdict, and where there is no error in the charge.

In respect to the complaint about the application of the case of the *Macon and Augusta Railroad Company vs. Vaughn*, 48 *Georgia Reports*, 464, to this case, we remark that it does not appear that the motion for a new trial was based thereon; but if it had been, with proper qualifications, we think the law there decided is applicable to this case. It is true that in that case there was no evidence at all of negligence; in this there is some; but in both cases the animal was killed in a pasture enclosed on both sides of the railroad; and as we have presumed that the court charged correctly when the contrary does not appear, and as the jury have found no negligence on the part of the company in this case, the two cases, with that finding, are exactly alike. We must, therefore, affirm the judgment.

Judgment affirmed.

WILLIAM L. EDMONDSON, plaintiff in error, vs. THOMAS LEACH,
trustee, defendant in error.

An estate forfeited by breach of condition subsequent, is not revested in the grantor until after entry or action brought by him or his heirs. Before such entry or action, the land is not subject to levy and sale as the grantor's property, under a judgment later than the conveyance: 8 Blackford, 138.

In a claim case, the plaintiff did not show the property subject, *prima facie*, by producing a deed from the defendant, dated prior to the judgment, conveying the land to trustees and their successors forever, "in trust that they erect and build a house or place of worship for the use of the members of the Methodist Episcopal Church, South, in the United States of America," and by proving that the premises, while held under the deed, were built upon and occupied as a methodist camp-ground, and that, previous to the levy, and five years previous to the trial, the methodists of the county concluded to discontinue the use, removed some of the erections, left the land vacant, appointed an agent to sell it, who, however did not sell it, and that it has remained vacant ever since. The plaintiff's case was not made out although the claimant was not one of the trustees, and so far as appeared, did not represent the church or the church members, or claim for their benefit.

Estates. Condition. Levy and sale. Claim. Before Judge McCUTCHEEN. Murray Superior Court. August Adjourned Term, 1875.

Reported in the opinion.

JOHNSON & McCAMY, for plaintiff in error.

D. A. WALKER, by brief, for defendant.

BLECKLEY, Judge.

A judgment was rendered in 1859; execution founded thereon was levied in 1875 upon certain lands, as the property of the defendant. A claim was interposed by Leach, as trustee for Mrs. Waterhouse.

The case was tried at August term, 1875. There was no conveyance shown passing title into the defendant, and no proof submitted going to the fact of actual possession of the

premises by him at any time. The plaintiff produced in evidence a deed made by the defendant in 1845, for the nominal consideration of \$5 00, conveying the premises (fourteen acres, more or less,) to six trustees "and their successors in office forever, in trust that they erect and build a house or place of worship for the use of the members of the Methodist Episcopal Church, South, in the United States of America." The facts indicated in the third head-note to this opinion, as to the use of the property for a camp-ground, its subsequent disuse, etc., were also proven; and there the plaintiff rested. The court dismissed the levy, not deeming a *prima facie* case made for the jury to pass upon.

1. We do not find it necessary to rule on the question whether, on the facts proven, the grantor might have entered as for the breach of a condition subsequent. It is enough that, so far as appears, he did not enter nor attempt to do so, and, if he be dead, that his heirs have not so done or attempted: 20 *Georgia Reports*, 563.

2. It would be altogether illogical to hold that the entry by the sheriff, for the purpose of making the levy, would serve as a substitute for entry by the grantor or his heirs. This would be to say that there was no estate for the sheriff to seize, and that still, by setting about making the seizure, the officer might bring the estate into existence. As well could we put fruit on a tree by going with a basket to gather it. Besides, the method of levying upon land in this state is not by taking possession, but by writing out the levy on the *fi. fa.* and giving notice: 46 *Georgia Reports*, 309; 50 *Ibid.*, 418. There is no actual entry upon the land by the officer.

3. Finally, if we could hold that, under the facts, the grantor was reinstated before the levy, in all the title he ever had, it would still leave the question whether he ever had any title whatever? And what proof is there that he ever had either title or possession? We do not recognize the position that in a claim case the *onus* is changed by simply showing that the defendant in *fi. fa.* once conveyed the land levied upon, and that the conveyance is no longer operative. This

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might suffice if it were shown that the claimant, resisting the levy, claimed title under that conveyance. But in the present case no such fact appears. The court ruled correctly in dismissing the levy.

Judgment affirmed.

JACKSON CARTER, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

Where a question of fact is submitted to the judge for trial, without the intervention of a jury, his decision is as binding on the parties as a verdict, and will only be set aside under the same rules as apply to the vacating of the finding of a jury.

Where a jury list was headed "A list of names of jurors in the jury box of Ware county," and was followed by "Given under our hands and seals," signed by the commissioners, ordinary and the clerk of the superior court, the law was substantially complied with, notwithstanding there was no certificate attached that the list contained all the names in the jury box.

Under the present practice of trying the competency of jurors, only the statutory questions can be asked in the first instance. After the juror is pronounced *prima facie* competent, then evidence may be introduced showing his incompetency. After the introduction of such testimony it is within the province of the court to examine the juror further.

Separation of the jury, known to the defendant at the time, but not brought to the attention of the court until after verdict, is no ground of new trial.

Where the question in issue is whether the defendant was insane at the time of the commission of an alleged offense, it is incompetent to ask a physician whether certain domestic troubles constituted a sufficient cause to produce insanity in the defendant.

Where a question propounded by the prosecution was subsequently withdrawn, the refusal of the court to allow the answer to be recorded was not such an abuse of his discretion as to require a new trial.

Hearsay evidence is inadmissible.

Unless the presumption of sanity is overcome by a preponderance of testimony, the jury would not be authorized to acquit on ground of insanity.

The verdict is neither contrary to the law nor to the evidence.

Criminal law. New trial. Practice in the Superior Court. Jury. Evidence. Insanity. Before Judge HARRIS. Ware Superior Court, September term, 1874.

Reported in the decision.

Carter *vs.* The State of Georgia.

M. L. MERSHON; GOODYEAR & HARRIS, by brief, for plaintiff in error.

SIMON W. HITCH, solicitor general; Z. D. HARRISON; JOHN C. NICHOLS, for the state.

WARNER, Chief Justice.

The defendant was indicted for the offense of murder, and on his trial therefor was found guilty. A motion was made for a new trial on the following grounds, which was overruled by the court, and the defendant excepted :

1st. Because the court erred in ruling that it had been proved before him, upon challenge of the array of jurors in said case, upon first and second grounds taken, that the commissioners had all been sworn under section 3910 of the Code of Georgia, when, as defendant alleges, the testimony of Mr. Cason showed affirmatively that he had not been sworn.

2d. Because the court erred in ruling that the jury list was correctly made out in substantial compliance with the law, when, as defendant alleges, there was no certificate attached to said list that it contained all the names in the jury box.

3d. Because the court erred in ruling that the order of the judge at the present term of the court, for completion and revision of the jury box, by making a list, was in conformity to the substantial requirements of the statute authorizing the judge to order a revision.

4th. Because the court overruled the following question asked of J. White on the challenge for favor: "Have you formed a fixed opinion as to the sanity or insanity of the prisoner at the bar, and do you still entertain that opinion?" as to all the jurors subsequently put upon prisoner, the court ruling that the question might be asked, "Have you formed a fixed opinion for or against the prisoner, and do you still entertain that opinion?"

5th. Because just before court convened after dinner, at the noon recess, on Monday, October 4th, 1875, five of the jury

ere found up stairs in charge of a bailiff, and seven were below stairs, separated from the five above stairs, at the time so in charge of a bailiff, which fact, though it came to counsel for defendant, was not brought to the knowledge of the court, testimony having been already taken in said case.

6th. Because when Doctor J. J. Harris was placed on the stand and asked, among other questions, the following: "From all the evidence in this case in relation to the desertion of Carter's children by his wife, and her prostitution, do you consider it a sufficient cause for insanity in Carter, should such insanity exist?" The court overruled said question and erred therein.

7th. Because James M. Mullis, when put upon the stand in rebuttal of the testimony of the defense, was asked by the state "How long before the killing of Corbett did you see him (meaning Carter) last?" His answer was, "I had not seen Carter so frequently before the killing." The court refused to allow such answer to go on the record, although he had allowed it to go to the jury, because the state withdrew the question which evoked the answer, and erred therein.

8th. Because when J. H. Miller was sworn by the defense to rebut the rebutting evidence of the state, and was asked: "Were you a notary public in 1874?" and was answered "yes," when the following question was asked: "Did you receive a message by Jim Corbett purporting to come from Corbett, deceased, about an attachment by Carter against Corbett and what was it?" This was overruled by the court, counsel for defense stating that they expected to prove said message from Corbett, deceased, to be that Carter was crazy and to pay no attention to him.

9th. Because the court refused to charge the following written request: "That if the jury, after examining all of the evidence in said case, are not satisfied beyond a reasonable doubt of the sanity of the prisoner at the time of the commission of the homicide; if their minds are wavering or doubtful upon this point, not at rest as to his sanity or insanity, the prisoner is entitled to the benefit of that doubt, and the

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jury are bound to acquit." But did charge that if there was a preponderance of evidence in favor of insanity the jury must acquit.

1. It appears from the record that the defendant challenged the array of jurors put upon him by the state, on the ground that the commissioners who revised the jury box had not been sworn as required by the 3910th section of the Code, and that the jury list had not been made out and certified by the commissioners as required by law. It was agreed by the counsel for defendant and the state, in writing, that the presiding judge should hear evidence and pass upon the facts and the law in relation to this ground of challenge. After hearing the evidence, the judge found that the commissioners were sworn according to law. This finding of the judge was binding on the parties and the defendant had no legal right to complain of it.

2. It appears from the evidence in the record that the jury list was headed "A list of names of jurors in the jury box of Ware county," and after all the names appeared the following: "Given under our hands and seals," giving the day and date, and signed by the commissioners, ordinary and clerk of the superior court, no certificate appearing to said list other than the above statement. The court ordered the commissioners to complete the jury list already made, and to file the same in the clerk's office as the jury list of the county. The jury list, as made out by the commissioners in the first instance, the names on which had been placed in the jury box, was a substantial compliance with the law, and the order of the court to make it more complete by complying with the formal requirements of the statute, did no harm to anybody. We are in some doubt as to whether there was any jury list made out by the commissioners prior to the order of the court directing it to be revised and certified, from the confused statement in the record, but in either event there was no error in overruling the defendant's challenge to the array of the jurors put upon him by the state. The jurors were drawn from the box in which the same were placed by competent legal au-

ority, and under the supervision of the proper officers appointed for that purpose.

3. There was no error in overruling the question asked the juror White: "Have you formed a fixed opinion as to the sanity or insanity of the prisoner at the bar, and do you still entertain that opinion?" *Nisbet vs. The State*, 43 *Georgia Reports*, 238.

4. There was no error in overruling the 5th ground of defendant's motion. If he or his counsel knew that the jury had separated during the progress of the trial, it was his duty to have called the attention of the court to it then, and not to have remained silent and taken his chance for an acquittal, until after the verdict was rendered.

5. There was no error in ruling out the testimony of Dr. Harris, as set forth in the 6th ground of the motion. The question in issue on trial was whether the defendant was insane at the time of the commission of the alleged offense, and not what would be a sufficient cause to produce insanity.

6. There was no error in overruling the 7th ground of the motion. The refusal of the court to allow the answer of the witness to be recorded was a matter for the discretion of the court, and did the defendant no harm.

7. There was no error in rejecting the evidence of Miller, as set forth in the 8th ground of the motion. It was merely hearsay evidence, and Jim Corbitt was a competent witness to prove the message sent by him from the deceased to the notary public, if, in fact, such a message was sent.

8. There was no error in the charge of the court, and refusal to charge as requested, as set forth in the 9th ground of the motion. Inasmuch as the law presumes, for the safety of society, that every person is of sound mind until the contrary appears, therefore that presumption should be rebutted by a preponderance of evidence of insanity at the time the offense is alleged to have been committed. Unless there is a preponderance of evidence in favor of the insanity of the defendant, the jury would not be authorized to acquit him of

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the offense with which he is charged on that ground of his defense.

9. The 10th, 11th, 12th, 13th and 14th grounds contained in the motion will all be considered together, the substance of which is, that the verdict is contrary to law and the evidence. After a careful review of the evidence contained in the record we are of the opinion that there is a preponderance of evidence in favor of the verdict, and that being so, the verdict is not contrary to law, but in accordance therewith, and as the presiding judge was satisfied with the finding of the jury, we will not interfere with the exercise of his discretion in overruling the defendant's motion for a new trial.

Let the judgment of the court below be affirmed.

J. W. & C. A. MCINTIRE, plaintiffs in error, vs. LORENZO D. TYSON, defendant in error.

1. This court will not control the discretion of the presiding judge in granting a new trial on the ground that the verdict is against the weight of the evidence, unless it appears clearly from the record that the verdict is right, and the discretion of the judge has been abused. Ordinarily, no great harm can be done by trying the case over again.
2. The motion for a new trial should be made at the term when the verdict is rendered except in extraordinary cases, but the rule *nisi* need not then be granted; if granted at a subsequent term, or about to be granted, and service of it be waived, it is enough to hold the case in court, and the motion should not be dismissed, it having been regularly continued from term to term.

New trial. Practice in the Superior Court. Before Judge CHISHOLM. City Court of Savannah. July Term, 1875.

Reported in the opinion.

MELDRIM & ADAMS, by brief, for plaintiffs in error

J. R. SAUSSY, by brief, for defendant.

JACKSON, Judge.

In this case the city court granted a new trial. We will control its discretion in granting it on the ground that the evidence is decidedly against the verdict. No great harm is done. Besides, we think the verdict is against the weight of the evidence, though perhaps the verdict could be sustained.

A motion was made to dismiss the motion for a new trial because no rule *nisi* had been granted. The plaintiffs in error, when the lost papers had been established, waived service of the rule *nisi*. The object of the rule *nisi* was to bring them before the court. After they came in, having waived service of the rule *nisi*, it is too late to object and move to dismiss because it had not been granted sooner. The statute does not require the rule *nisi* to be granted and served at the first opportunity. The motion was then regularly made and the brief of the defense approved. And after the parties had waived service, the cause had been continued for their absence, it was too late for their motion. The rule *nisi* could then have been granted at the discretion of the court, and served, and it would have been done, doubtless, but for his waiver. We affirm the judgment.

MATHEWS, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

Newly discovered evidence in this case suggests such a doubt as to whether the prisoner's offense may not be voluntary manslaughter instead of murder; that, although not fully convinced that he is entitled to a new trial, under the strict rules of law, this court, in the exercise of the discretion confided to it by statute, directs a new trial, in order that the prisoner may have his case examined in the light of all the evidence, by a jury, whose province it will be to look at the facts themselves, and not suffer the doubt above indicated to influence their finding, unless a like doubt shall arise in their own minds by reason of the evidence which shall come before them, nor unless it shall moreover seem to them to be a reasonable doubt.

Gray *vs.* Culberson *et al.*

Criminal law. New trial. Before Judge RICE. Ocoee Superior Court. November Term, 1875.

Report unnecessary.

COBB, ERWIN & COBB; S. P. THURMOND; J. R. LYLE; P. G. THOMPSON, for plaintiff in error.

EMORY SPEER, solicitor general, for the state.

BLECKLEY, Judge.

There is no error in the record, except as to the newly discovered evidence. In respect to that, while we are not entirely convinced, we deem it best to treat the case as special and peculiar, and give it the direction indicated in the head-note. Human life being involved, we do not feel quite warranted in denying a new trial on the state of facts.

Judgment reversed.

JOHN D. GRAY, plaintiff in error, *vs.* AUGUSTUS B. CULBERSON *et al.*, defendants in error.

(BLECKLEY, Judge, having been of counsel, did not preside in this case.)

A decree was rendered requiring the defendant to deliver to plaintiff thirteen shares of stock in a mill company, which were included in a certificate for fifty shares of original stock, the defendant to retain the other thirty-seven shares. Defendant's attorney, having obtained possession of said stock, applied to the mill company to issue certificates in accordance with such judgment. The company issued to defendant new stock to the value of thirty-seven shares of the original stock, but declined to issue to plaintiff in new stock the equivalent of the thirteen shares of original stock, upon the ground that plaintiff had, pending the litigation and before decree, obtained from it all of the extra new stock to which such fifty shares were entitled. On the aforesaid facts, the court did not err in discharging a rule against the attorney requiring him to show cause why said stock should not be delivered in accordance with the decree.

Attachment. Attorneys. Decree. Before Judge HOKINS. Fulton Superior Court. April Term, 1875.

Report unnecessary.

JULIUS L. BROWN; HILLYER & BROTHER, for plaintiff error.

A. B. CULBERSON, for defendants.

WARNER, Chief Justice.

This was a rule against the defendant, as an attorney at law, at the instance of the plaintiff in an attachment suit, to show cause why he should not perform a decree that had been rendered against his client upon an equitable plea filed in the case, requiring the latter to deliver to the plaintiff thirteen shares of stock in the Scofield Rolling Mill Company which were included in a certificate for fifty shares of original stock, and thirty-seven shares of new stock of the company. The court, after considering the respondent's answer to the rule, discharged the same; whereupon the plaintiff excepted.

On the statement of facts disclosed in the record we will not interfere to control the discretion of the court in discharging the rule against the attorney of the defendant who appears to have acted in good faith. Besides, it is a novel and rather extraordinary proceeding in our courts to require an attorney, by rule, to perform a decree made against his client.

Let the judgment of the court below be affirmed.

EDWARD POWER *et al.*, plaintiffs in error, *vs.* THE SAVANNAH, SKIDAWAY AND SEABOARD RAILROAD COMPANY, defendant in error.

When a motion for a new trial is made at the proper term of the court, but no rule *nisi* is granted, and no brief of the evidence approved by the presiding judge, and the case comes on to be heard before the succeeding judge, and no motion is made to dismiss preliminary to the argument on the merits, and the motion to dismiss is mainly insisted on after the judge has announced his decision to grant the new trial, and the judge allows the

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objecting party to amend the brief of evidence to suit himself, and he does so amend it, and the rule *nisi* is waived, this court will not control the discretion of the circuit court in such a case in hearing the motion and refusing to dismiss it at such a stage of the proceedings.

2. When a party dies pending suit, and a new party, not the legal representative of deceased, is made a party in his stead by consent, on the express condition, entered of record, that the other party shall lose no right thereby, the sayings of the original party, now dead, in regard to the value of the right of way, and the written evidence of his grant of the right of way to the adverse party, are admissible, though deceased had made a deed to the land in trust for his wife and children before he commenced suit for the right of way, the issue being the value of the right of way and damages therefor.
3. A motion for a new trial is amendable.

New trial. Practice in the Superior Court. Evidence. Amendment. Before Judge TOMPKINS. Chatham Superior Court. May Term, 1875.

Reported in the opinion.

HARTRIDGE & CHISHOLM, for plaintiffs in error.

T. M. NORWOOD; G. A. MERCER, by R. R. RICHARDS, for defendant.

JACKSON, Judge.

On the appeal from arbitrators to assess damages for right of way over plaintiffs' land, the jury found \$1,000 00 for plaintiffs. Notice was given of a motion for a new trial; the motion was made; no *supersedeas* was obtained; no brief of the testimony was approved by the court. Judge Schley, who tried the case, passed out of office, and the motion for a new trial came before the present judge of the Eastern Circuit, Judge Tompkins, who granted the new trial, and error is assigned thereon.

1. The first error assigned is that the judge erred in hearing the motion for a new trial under the facts. The rule *nisi* was waived, and the court permitted the counsel for plaintiff to amend the brief of the evidence. We cannot see how he

injured. The 21st rule of the superior court provides a case where the presiding judge has gone out of office without approving the brief (Code, page 950) by providing that in such a case "the successor shall hear and determine the motion from the best evidence at his command." Judge Hopkins did this in this case. Indeed, he seems to have given the defendant in error a *carte blanche* to fix the evidence to suit himself, and states in his certificate that no motion was made to dismiss the rule before argument, but only during argument, and principally after he had announced that a new trial would be granted. Under these facts, we will not control the discretion of the court below in hearing, and in refusing to dismiss, the motion for a new trial. See *Pope vs. Toombs*, 20 *Georgia Reports*, 768; also 30 *Ibid.*, 249; 53 *Ibid.*, 178. or will we control his discretion in granting the new trial.

It is true that the judge who granted the motion did not predicate, and therefore we pass by the consideration of his ruling on the weight of the evidence, if, indeed, the grant of the motion was predicated on that ground. We confess, however, that to us the weight of the evidence seems against the verdict; but we put our affirmance of the judgment granting the new trial upon what we consider plain errors in the court trying the case.

2. The action was brought in the name of George and Edward Power. George died, and Edward, as trustee, was made a party by consent, on the agreement in writing, that no rights of the defendant were to be prejudiced thereby. The defendant offered to prove that George had given the right of way to the defendant, in view of the increased value of his land, and offered in evidence a writing to that effect. The court rejected it. Defendant offered to show the estimate that George had put on the value of the land during his life. The court rejected it. If George Power had remained a party, or his administrator or legal representative had been made one, this evidence would have been admissible. Well, when the defendant stipulated that if he consented that Edward Power, trustee, be made a party, he should lose no right, he must not be

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made to lose his right to prove the sayings of George Power as to the value of the land, nor must he lose the right to show the written agreement of George to give the right of way.

3. The motion for a new trial was amendable, and the court properly allowed it: Code, section 3503.

We affirm the judgment granting the new trial.

BELLE VIRGIN *et al.*, plaintiffs in error, vs. JOHN T. WINGFIELD, administrator, defendant in error.

1. Where, upon a bill filed by the children of *cestui que trusts* against the administrator of the purchaser of property sold by the trustee, to recover the same, the defense is title by prescription, the trustee is an incompetent witness to prove what passed between him and the purchaser at the time of the execution of the deed relied on as color of title, in order to show that such instrument originated in fraud: WARNER, Chief Justice.
2. The verdict was neither contrary to the law nor the evidence.

New trial. Witness. Before Judge POTTLE. Wilkes Superior Court. November Term, 1875.

This is the third time this case has been before this court. See 51 *Georgia Reports*, 139; 54 *Ibid.*, 451.

Report unnecessary.

W. M. & M. P. REESE; VASON & DAVIS; JOHN C. REED, for plaintiffs in error.

R. TOOMBS, for defendant.

WARNER, Chief Justice.

This was a bill filed by the complainants against the defendant to recover certain described property, including a house and lot in the town of Washington, Wilkes county. On the 14th of October, 1863, Weems, who was in possession of the house and lot, acting as trustee for his wife, sold

conveyed the same to Wylie for the sum of \$17,500 00, signing the deed as trustee. The complainants are the children of Weems and wife, and claim the property sued for under a trust deed executed by Weems and wife to Wingfield in 1851. For a more detailed statement of the facts of the case, see *Wingfield vs. Virgin et al.*, 51 *Georgia Reports*, 139. This is the third time this case has been before this court. It was first brought here by the defendant, Wingfield, and this court reversed the judgment of the court below and granted a new trial, holding that Wylie, the defendant's intestate, had a good prescriptive title under the statute to the house and lot as against the complainants. When the case went back to the court below the complainants amended their bill, alleging that the deed under which Wylie went into possession as color of title, made by Weems to him, was procured by fraud, and sought to prove the fraud by Weems. The court below held that Weems was an incompetent witness and dismissed the case. The complainants sued out their writ of error and brought the case here for review. This court reversed the judgment of the court below, holding that Weems was a competent witness, and that the question whether the deed from Weems to Wylie originated in fraud in order to defeat his prescriptive title, was a proper question to be submitted to a jury under the allegations in the complainants' amended bill. On the last trial of the case, on the question of fraud, the jury, under the charge of the court, found and verdict in favor of the defendant. A motion was made for a new trial on the several grounds set forth therein, which was overruled by the court, and the complainants excepted. The only witness who testified that Wylie knew that his possession of the house and lot originated in fraud, under his deed from Weems, was Weems himself, one of the parties to the contract. All the other witnesses testify to what Wylie said and did afterwards, when the validity of his title to the house and lot had become a matter of discussion amongst his neighbors. Although I concurred in the judgment of the court, holding that Weems was a competent witness on the

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trial of the case of the complainants against the defendant, he not being a party to that suit then on trial, it does not necessarily follow that because a witness is competent to prove general facts within his knowledge, that he is competent to prove certain special facts, under the provisions of the evidence act of 1866; and if the testimony of Weems as to what he said to Wylie, and what Wylie said to him at the time of the execution of the deed by him to Wylie, going to show that it was a fraudulent contract, had been objected to on the ground that Wylie, the other party to that contract, was dead, the objection, in my judgment, should have been sustained, although he might have been a competent witness to testify as to other facts in the case independently of what was said and done between himself and the dead man, Wylie, at the time of the execution of the deed by himself to Wylie.

2. The testimony of Weems, however, was admitted in relation to what was said by him to Wylie, and by Wylie to him, at the time he sold the house and lot and executed the deed to Wylie therefor, without objection, and the jury found for the defendant with that evidence before them. The question was not whether Wylie could be charged as a trustee in view of the principles recognized by courts of equity, if the suit had been instituted within seven years; but the question was, whether Wylie had a good prescriptive title to the house and lot, under the law and facts of the case? According to the previous ruling of this court in this same case, (*Wingfield vs. Virgin et al.*, 51 *Georgia Reports*, 139,) Wylie had a good prescriptive title to the house and lot under the law, unless it could be shown that his prescriptive title *originated in fraud*. The fact that it appears from the evidence in the record that Wylie paid a fair and full consideration for the property to Weems, when he purchased it from him and took his deed therefor, and went into possession under that deed, is strong presumptive evidence, at least, that it was a *bona fide* purchase of the property on the part of Wylie. To rebut that presumption, and to show that Wylie's prescriptive title which he claims, under the law, originated in fraud, the testimony

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Weems is mainly relied on. In view of his testimony, taken in this case on a former trial, and his testimony on the last trial, as the same appears in the record, it is quite probable that the jury did not give much credit to it, and that was exclusively a question for their consideration. The charge of the court in relation to the main controlling points in the case, was substantially correct, and although there may have been some errors in it, still the verdict was right under the law and facts of the case, and we will not disturb it.

Let the judgment of the court below be affirmed.

JOHN LEE, plaintiff in error, vs. THE STATE OF GEORGIA,
defendant in error.

An indictment for burglary, which alleged that the defendant "did break and enter the Savannah theatre, the property of one Thomas Arkwright and his place of business, with intent to commit a larceny," without any allegation that valuable goods, wares, produce, or any other article of value was contained or stored therein, or stolen therefrom, is bad, and judgment thereon should be arrested.

Criminal law. Burglary. Before Judge TOMPKINS.
Chatham Superior Court. February Term, 1875.

Reported in the opinion.

F. G. DuBIGNON ; J. V. RYALS, by brief, for plaintiff in error.

A. R. LAMAR, solicitor general, by W. G. CHARLTON, for the state.

JACKSON, Judge.

In this case the defendant was indicted and found guilty, and moved to arrest the judgment on the ground that the bill

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of indictment did not allege that the Savannah theatre, the place he was charged with breaking into, was a place where valuable goods, wares, produce, or any other article of value, was contained or stored. The indictment alleged that the theatre was the property of Thomas Arkwright and his place of business, and was broken into and entered with intent to commit a larceny. We all think it insufficient. Whether any article of value was in that theatre or not we do not know. If the indictment had alleged that, after entering, the defendant stole therefrom anything of value, it would have been sufficient, in my judgment, for it would then have showed it contained that thing of value. A theatre may or may not have things of value stored or contained in it; if it has, burglary can be committed therein; if it has not, burglary cannot be committed in it. The word theatre does not, *ex vi termini*, import that it is a place where valuable goods are stored, as I thought in my dissenting opinion in the mill-house case, decided at this term, that a mill-house, especially if corn was alleged to have been stolen from it, did; the word theatre does not import necessarily anything but the stage on which the actors play and the room in which the acting is done and seen; and as there is no allegation that anything valuable was in this theatre or stolen from it, as in the case referred to, (there was an allegation that corn was stolen from the mill-house,) I concur with my brethren in this case, and we all think the indictment bad, and that the judgment should be arrested, and it is so ruled.

Judgment reversed.

J. M. & J. C. ALEXANDER, plaintiffs in error, *vs.* THE STATE OF GEORGIA, defendant in error.

(BLECKLEY, Judge, having been of counsel, did not preside in this case.)

1. The disability of the plaintiff to sue should be set up at the first term, and before pleading to the merits.

governor has authority to institute suit for the recovery of money of which the state has been defrauded, under the general power granted to him of supervising the property of the state.

Where a declaration in favor of the state is signed by attorneys, the legal presumption, upon demurrer, is that they had the authority of the governor to institute the suit.

Though the bill of particulars charged the defendants with gross amounts, no objection having been made thereto, it was competent to prove the various items composing the same.

Where a recovery is sought from a firm on account of various frauds perpetrated by one of the partners in the firm name, and one of the transactions in which such partner fraudulently obtained a large sum of money for the plaintiff, was conducted in his own name, yet was so interwoven with other frauds perpetrated in the firm name as to render its explanation necessary to the elucidation of the former, such transaction may be shown, though the firm be not liable therefor.

Where a member of a firm colluded with a third person to defraud the plaintiff, and the plaintiff recovered judgment against such third person for various sums of money of which she had been thus defrauded, and subsequently brought suit for the same money against the firm, such judgment, in the absence of any evidence of its payment, is immaterial testimony.

The state can only be estopped from asserting her right to her own property by legislative enactment or resolution.

Where money was fraudulently obtained by a partner in the name of the firm and in business transactions such as the firm usually engaged in, from the state, the firm would be liable therefor, even though such fraudulent transaction was unknown to the other partner. If the officer or agent of the state paying the money, knew that such partner was acting in violation of duty to the firm, the latter would not be liable.

The firm would not be liable for money fraudulently obtained from the state by such partner in a matter having no connection with the ordinary business of the partnership, and of which it did not receive the benefit.

Readings. Parties. State. Governor. Attorney and
 . Presumptions. Evidence. Estoppel. Partnership.
 1. Before Judge HOPKINS. Fulton Superior Court.
 1 Term, 1875.

The state of Georgia brought complaint against J. M. & Alexander on an account for money had and received. The declaration was attached the following bill of particu-

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1870. December 16th. To cash from treasury of Western and Atlantic Railroad	\$1,648 81
“ December 27th. To cash from treasury of Western and Atlantic Railroad	3,097 61
“ December 27th. To cash from treasury of Western and Atlantic Railroad	5,995 40
“ December 27th. To cash from treasury of Western and Atlantic Railroad	5,178 15
1871. January 19th. To cash from treasury of the state	5,995 40
	<hr/>
	\$21,915 37

The declaration was signed by no official of the state, but simply by several members of the bar, as “plaintiff’s attorneys.”

The defendants pleaded the general issue, and that the transactions complained of were not those of the firm, and were unknown to J. M. Alexander. J. C. Alexander pleaded specially, that in consideration of his testifying in behalf of the state in reference to the frauds perpetrated against the Western and Atlantic Railroad, whenever required by the proper authorities, and of his repaying to the state all the money he had fraudulently collected, to-wit: \$3,950 00, a committee of the legislature and Linton Stephens, Esq., who was charged with the prosecution of said frauds, discharged and released him from all liability on account of the matters complained of in plaintiff’s declaration.

After the above pleas were filed, at the trial term, defendants demurred to the declaration because there was no law, general or special, authorizing the suit. In connection with the demurrer, defendants moved that counsel for plaintiff be compelled to show their warrant of attorney to institute the suit. The demurrer and motion were both overruled, and this decision is made the basis of the first two grounds of the motion for new trial.

In connection with this ruling it had best be stated that the record discloses that the following telegram was introduced in evidence at some time during the trial, probably on the argument of the aforesaid demurrer and motion:

" BRADFORD, CONN., August 17th, 1871.

" *To Hon. George Hillyer, for Board :*

" Your dispatch of the 16th, received. If any authority is necessary from me, your board are hereby invested with all the authority I have in the premises. I had previously obtained intimation of serious misdoings, and instructed Mr. Blodgett to make thorough investigation, and if guilty parties could be ascertained, to secure immediate restitution of the money, and prosecution of the persons engaged in the fraud. I would therefore suggest that you confer with Mr. Blodgett on the subject.

(Signed)

" RUFUS B. BULLOCK, *Governor.*"

The Hon. George Hillyer, to whom this dispatch was addressed, was one of the attorneys whose name was signed to the declaration.

It was shown by the plaintiff that from February, 1870, to December of the same year, including the latter month, there was paid by the Western and Atlantic Railroad to J. M. & J. C. Alexander, \$20,877 63, whilst the books of said firm only show sales to said road from December 1st, 1869, to December 30th, 1870, amounting to \$11,046 72, which were paid for in cash, \$9,726 70, and in merchandise, \$1,320 02. Deducting the amount of goods actually sold from the amount for which payment was made, leaves overpayment of \$9,830 91. Deducting from this \$3,950 00, which the evidence disclosed was returned by J. C. Alexander to the state, leaves \$5,880 91.

In the course of the examination of I. P. Harris, the former treasurer of the Western and Atlantic Railroad, plaintiff proved by him the payment to J. M. & J. C. Alexander of the second amount specified in the bill of particulars. This sum of \$3,097 61 was composed of two separate bills in favor of the defendants against the road, the first for \$1,153 20, approved by E. F. Blodgett, general purchasing agent, and receipted by J. C. Alexander; the second for \$1,944 21, audited by Mr. Hotchkiss, the auditor of the road, and approved by Fry, purchasing agent. The witness testified that these two items were embraced in one bill which was passed by the auditor, and that one warrant for the entire amount was issued; that the consolidated bill was receipted by J. M. & J. C. Alexander, in the handwriting of the latter.

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To this evidence, together with the papers supporting the same, the defendants objected, because the two items aforesaid were not declared on in the bill of particulars. The objection was overruled, and this constitutes the third, fourth and sixth grounds of the motion for new trial.

The plaintiff offered in evidence the following papers:

1st. Sight draft by McEwen, Grant & Company on treasurer of Western and Atlantic Railroad, in favor of J. M. & J. C. Alexander, for \$5,995 40, dated New York, December 7th, 1870, across the face of which was written "Motive power. Audited for pay at thirty days. December 10th, 1870." Signed "N. P. Hotchkiss, auditor."

2d. Four itemized accounts against Western and Atlantic Railroad in favor of McEwen, Grant & Company, of New York, aggregating \$5,995 40.

3d. Authority from McEwen, Grant & Company to J. C. Alexander to receipt for executive warrant for \$5,995 40, the same being amount of audited claim in their favor by commissioners, of date March 13th, 1871.

4th. Award of commissioners appointed under act of October 24th, 1870, authorizing lease of Western and Atlantic Railroad, as follows:

"MCEWEN, GRANT & COMPANY *vs.* WESTERN AND ATLANTIC RAILROAD.

"Claim for railroad supplies, \$5,995 40.

"The above claim audited and approved for the sum of \$5,995 40. Pay J. C. Alexander. April 19th, 1871.

(Signed)

"BENJAMIN CONLEY,

"GEORGE HILLIER,

"Commissioners.

"Judge WALKER did not preside in this case. By the Board.

(Signed)

"A. B. CULBERSON, Clerk."

5th. Executive warrant of R. B. Bullock, governor, in favor of McEwen, Grant & Company, or bearer, for \$5,995 40 on state treasurer, to account of 8th section of act of 24th October, 1870, authorizing lease of Western and Atlantic Railroad, dated April 28th, 1871, and approved on same day by the comptroller general.

All of the testimony was objected to, as it tended to show the individual transactions of J. C. Alexander. The objection was overruled, and this constitutes the fifth ground of the motion for a new trial.

In the progress of the trial the defendants offered in evidence the record of a judgment in favor of the state, on the information of C. P. McCalla, against Joseph Fry, in which suit were embraced the various items now sought to be recovered from them. Fry was the clerk of E. F. Blodgett, the purchasing agent of the Western and Atlantic Railroad, and the accomplice of J. C. Alexander in the frauds perpetrated. On objection of plaintiff the evidence was excluded, and this ruling is assigned as error.

The defendants offered to show by George Hillyer and Richard H. Clark, conversations between them and Linton Stephens, Esq., in which it was claimed that he, as the attorney of the state, admitted a promise, for the considerations mentioned in the plea of J. C. Alexander, to save the latter harmless, civilly and criminally, on account of frauds perpetrated by him on the Western and Atlantic Railroad. The testimony of Clark would have extended the promise specifically to this case.

Mr. Stephens was retained by the governor under resolution of the general assembly, approved January 20th, 1872, authorizing the employment of an attorney "whose duty it shall be to cause to be brought in the proper court, all suits which may be necessary to the recovery of all property or money which has been illegally and fraudulently converted, belonging to said road (Western and Atlantic,) or the state, and cause to be prosecuted all persons who may be guilty of violating the criminal laws of the state, in any manner connected with the management of said road; and the said attorney, under the advice of the governor, shall take the entire control and direction of said suits and prosecutions," etc.

The evidence was excluded on objection of plaintiff, and this ruling forms the basis of the ninth and tenth grounds of the motion for new trial.

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Much other testimony was introduced, not material here. The substance of it was that J. C. Alexander, by collusion with Fry, and probably with others connected with the Western and Atlantic Railroad, defrauded said road out of large sums of money. These frauds were perpetrated by presenting bills in the name of the defendants, for articles which had never been delivered to the road, or which, if delivered, had already been paid for. The bills were generally receipted in the name of the defendants, sometimes in the name of J. C. Alexander alone. The books of defendants did not show any of these fraudulent transactions. J. M. Alexander denied any knowledge of the illegal dealings by his partner, in the name of the firm, with the road. As to the claim in favor of McEwen, Grant & Company, passed by the commissioners and settled by executive warrant, the evidence showed that it had previously been paid on the draft in favor of defendants. This payment was also a fraud as the road was not then indebted to any such firm as McEwen, Grant & Company. Most of the bogus bills were paid to Fry, sometimes in the presence of J. C. Alexander.

The remaining facts, so far as material, are reported in the decision.

R. H. CLARK; GARTRELL & STEPHENS, for plaintiffs in error.

N. J. HAMMOND, attorney general; HILLYER & BROTHER, for the state.

WARNER, Chief Justice.

This was an action brought by the plaintiff against the defendants as partners in a mercantile firm in the city of Atlanta, in the statutory form, to recover the sum of \$21,915 37, with a bill of particulars annexed. On the trial of the case, the jury, under the charge of the court, found a verdict in favor of the plaintiff for the sum of \$11,859 93 principal, and \$3,335 05 for interest, against both defendants; where-

they made a motion for a new trial, on the several grounds therein set forth, which was overruled, and the defendants excepted.

The demurrer to the plaintiff's declaration, on the ground the governor had no authority to institute the suit in behalf of the state, was properly overruled. The disability of plaintiff to sue was not objected to until after the defendant had pleaded to the merits of the action, and if good, it would have been taken advantage of at the first term by plea in abatement.

But we do not think the objection would have been good at any time. The governor had the power and authority to institute suit against the defendants, under the general powers vested in him, of a general supervision over all property of the state, the power to make all necessary regulations for the protection thereof when not otherwise provided for, and to engage the services of any competent person for the discharge of any duties required by the laws, and essential to the interest of the state, or necessary in an emergency to preserve the property or interests of the state: Code, sections 61-74.

The legal presumption was, at least, upon demurrer, that the attorneys, whose names were signed to the writ, had the authority of the governor to institute the suit.

There was no error in admitting the evidence of Harris as to the items of \$1,153 20 and \$1,944 00. The declaration and bill of particulars charged gross amounts, and the items sought to be proved were a part thereof; there was no objection to the declaration and bill of particulars, that it was sufficiently specific, at any time before the trial.

There was no error in admitting in evidence the award of the auditing board and accompanying papers, inasmuch as the same constituted a part of the transaction under investigation and connected with it.

There was no error in rejecting the record of the judgment against Fry, for the reason it did not appear that any part thereof had been paid.

There was no error in refusing to allow the testimony of

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Hillyer and Clark as to the promise made by Judge Stephens not to proceed against the defendant, J. C. Alexander, inasmuch as Judge Stephens had no authority to bind the state, even if he had made such promise. As a question of law, the state is not bound nor estopped from asserting her rights to her own property, unless it be done in her sovereign capacity by a legislative enactment or resolution.

It appears from the evidence in the record that the defendants, as partners, did quite an extensive business with the Western and Atlantic Railroad, selling it goods from time to time, and receiving payment therefor, and that J. C. Alexander was the active member of the firm in selling the goods and receiving payment from the treasurer of the road ; that at the time the bogus bills in favor of the firm were paid by the treasurer of the road, he had no reason for knowing that the same were not genuine bills, but paid the bogus bills when presented for payment, in the same manner as he paid the genuine bills due to the firm. There can be no doubt, from the evidence in the record, that the partnership firm of J. M. & J. C. Alexander, were engaged in the business of selling goods to the Western and Atlantic Railroad and receiving payment therefor from the treasurer of the road, and there is just as little doubt, from the evidence, that J. C. Alexander, one of the partners, whilst engaged in that business, fraudulently duplicated accounts, and by other fraudulent means received a large amount of money from the treasurer of the road, for which no goods were ever sold or furnished. J. M. Alexander was about the store, and usually ordered the goods, and knew they were selling goods to the Western and Atlantic Railroad. In view of the evidence in the record the court charged the jury as follows :

“This suit is brought by the state of Georgia for the purpose of recovering the sums of money named in the bill of particulars which you will find attached to the declaration.

“The plaintiff claims that the defendants, J. M. & J. C. Alexander, received those sums of money from it ; that they received this money without consideration, and that it should

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turned. The defendants deny that they are liable for it. The plaintiff claims that this money was paid to the treasury of the Western and Atlantic Railroad to the defendants, and that the money belonged to the state of Georgia. Money held in the treasury of the Western and Atlantic Railroad by its treasurer, for the purposes of the road, was the money of the state of Georgia.

If you find, from the testimony in the case, that a portion of the money thus held in the treasury of the Western and Atlantic Railroad, was paid to the defendants, J. M. & J. C. Alexander, on account of articles or goods which were claimed to have been sold or furnished by them to the road, but which, in fact, were not sold or furnished, and the money was paid to them without consideration, the state would have the right to recover it from them in this suit. If (to repeat the question) you find from the testimony in the case, that the money of the state, thus held in the treasury of the Western and Atlantic Railroad was paid to defendants, J. M. & J. C. Alexander, for goods or articles they claimed to have delivered to the road, but which were not, in fact, furnished, and the money was paid without consideration, the state would have the right to recover in this suit. It is claimed in this case that fraudulent claims were made, in the name of J. M. & J. C. Alexander, on the officers and agents of the Western and Atlantic Railroad for goods furnished, and that the claim was false and the goods were not furnished, and that on that account the money was paid. The defendants deny the facts, and say they are not liable at all. This is the question you are called to determine by your verdict.

It has been said that if money was paid improperly from the treasury of the road, that it was not paid to J. M. & J. C. Alexander, and that no money, thus paid, ever went into the treasury of the firm; if any such payment occurred, that it was the act of J. C. Alexander, for which the firm is not responsible about that, I will now instruct you. I have already instructed you, in general terms, if certain things took place, the firm would be liable.

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"The question you now have to consider is, to what extent the defendants in this case, J. M. & J. C. Alexander, are bound by the acts of J. C. Alexander. Look to the testimony in the case, and see, first, what the partnership business of J. M. & J. C. Alexander was; what was the scope of the partnership business; what was their business, their real business transactions; ascertain from the testimony what that was, so as to be able to determine when an act was within the scope of that legitimate partnership business. After having ascertained that, proceed under this rule: For the acts of J. C. Alexander, within the scope of the partnership business, within the ordinary business transactions of the firm, and under color of and in the name of the partnership, the firm would be liable, if the officer from whom the money was obtained had no knowledge or notice that J. C. Alexander was acting in violation of his duties and obligations to the firm. For his acts within the scope of the ordinary partnership business of the firm, done in the name of the firm, under color of the partnership, the firm would be liable if the officer paying the money had no knowledge or notice that he was acting in violation of his duties and obligations to the firm. If he was acting in violation of his duties to the firm, and the officer of the state paying the money had notice or knowledge of that at the time he paid the money, then the firm would not be liable for it. To apply the rule to this case; if you should find, from the testimony, that Fry was an agent, purchasing agent or other agent, of the Western and Atlantic Railroad, that bills were made out in the name of J. M. & J. C. Alexander, or claims were presented in their name for or by the party, J. C. Alexander, for articles purporting to have been furnished for the use of the road, and on that claim or claims in the name of the partnership, payments were made by the treasurer or other officers of the Western and Atlantic Railroad, and the officers withdrawing money from the treasury, and paying on that claim, had not knowledge of its true character, the firm would be liable.

"This same rule will apply if payment is made from the

ury of the state, if such payment was made to one of
 1rm or one acting under their authority. The firm, or
 r member of the firm, would have the right and power to
 int another to receive the money thus claimed for either
 em, if it was for the benefit of the firm; and if Fry was
 inted by the firm or a member of it, for the purpose of
 ving money from the treasury of the road on claims of
 character, it would stand just as if it had been received
 member of the firm, and the firm would be liable, or not
 e, under the rules I have given you. Gentlemen, if you
 any difficulty in understanding me as I go along, I hope
 will let me know, as I wish you to understand me. (A
 e, no answer.) It is not absolutely necessary to a recovery on
 part of the state that the money obtained should have gone
 he use of the firm; what is necessary is that it should have
 collected without consideration by a member of the firm,
 er color of the firm name, acting apparently within the
 imate scope of the partnership business, and without
 ce that the member was violating his duty to the firm, to
 officers by whose act the money was taken from the state
 l treasury, and delivered to defendants, or either of them,
 heir agent. For articles or goods that were in fact fur-
 ned, money could be properly paid, and when thus paid, it
 ld not be recovered in this suit to the extent that it may
 ear from the testimony in the case; if there was valuable
 sideration for the money paid, it could not be recovered. If
 find that plaintiff has no right to recover in this case, and
 ment has been made for all claims due, to that extent the
 ict should be lessened. If you find that payment has
 made for all claims due the state, find for the defendants.
 artly satisfied, verdict should be for balance due.

[It has been said in this case that because of a transaction with
 Charles P. McCalla, the claims of the state of Georgia, if
 ad any against the firm of J. M. & J. C. Alexander was
 ed, and that transaction operates as a bar to the recovery
 is case; and it is claimed that by virtue of an executive
 r McCalla was agent of the state, and had the right to

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make settlement of these claims, and that he did make it with J. C. Alexander, and that operated as a satisfaction against the firm. By the terms of this executive order, McCalla would proceed to bring up the accounts, etc. (Reading executive order.) This executive order did not confer on McCalla the power to make the alleged settlement with J. C. Alexander, and to release him from any claims the state might have against him; an agent must act within the scope of his powers, when he does that, as a general rule, his principal is bound; under this executive order it did not extend so far as to authorize him to accept from J. C. Alexander a sum of money in satisfaction of these claims.

"It is claimed that one Hargroves, who, it is said, was one of the attorneys of the state in this case, was party to the arrangement with J. C. Alexander and McCalla, and because of his position as attorney of record in the case, the settlement, if one was made, has force and is binding, and for that reason there can be no recovery. If Hargrove, whose signature appears, was attorney for McCalla, and not for the state, he only can represent his principal, and not the state, and his signature would not bind the state. If he was attorney of the state to represent this case, he was not authorized by law to accept, in satisfaction of any debt that was due from J. M. & J. C. Alexander, any less amount than was due in satisfaction of those claims. It will be your duty to take the testimony and give it a careful, impartial consideration. If you find in favor of plaintiff, express the amount; if in favor of defendants, say, we, the jury, find in favor of defendants. If you find in favor of plaintiff, look to the papers for the time suit was commenced; interest can only date from that time."

What is the legal *status* of this case when stripped of all irrelevant matters, and reduced to its simple elements? It is an action brought by the plaintiff to recover from the defendants, as partners, a sum of money which the plaintiff alleges they have fraudulently received from it, without consideration. The defendants admit that at least a part of the money claimed was procured from the plaintiff by the fraud of one

partners, J. C. Alexander, but insist that he is alone or the fraud, and not the other partner, and that is the question in the case. There was a good deal said on the part about the state being bound by the promises made in parties, to the defendant, J. C. Alexander, and about good and satisfaction, and settlement, etc. To all of which, I say, as we have already said, that the state is not bound or precluded from asserting her rights to her own property, more than by some act in her sovereign capacity. It is also presumed however, that she will do or has done justice to any of her citizens.

We will first consider the question as to the liability of the partnership, for the money fraudulently obtained from the Western and Atlantic Railroad by J. C. Alexander, one of the partners. The 1915th section of the Code declares, that the partners are responsible to innocent third persons for damages arising from the fraud of one partner in matters relating to the partnership. The 1916th section declares that partners are not responsible for *torts* committed by one partner. So far as the evidence shows, the state is an innocent third party, her treasurer of the Western and Atlantic Railroad, from whom her money was obtained by the fraudulent conduct of J. C. Alexander, had no knowledge that he was acting fraudulently and not in the regular and legitimate business matters relating to the partnership, when the money now sued for was paid to him as one of the partners of the firm, with whom it was then, and had been for a considerable time, dealing. It was insisted on the argument, though the conduct of J. C. Alexander in obtaining the money may have been a fraud, yet it was more than a mere fraud, that it was a crime punishable by law, and that one partner is not responsible for the *torts* or crimes committed by a copartner. The reply is, that the plaintiff is not seeking to make J. M. Alexander criminally responsible for the crimes of his copartner, J. C. Alexander, but is seeking to make him responsible, on the civil side of the court, for damages sustained in consequence of the *fraud* of his co-

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partner, J. C. Alexander, whilst engaged in matters relating to the partnership, that is, when acting within the scope of the copartnership business. One copartner is not responsible and liable to be punished on the criminal side of the court for the *torts* or crimes of his copartner, unless he has participated therein, and that is the true intent and meaning of the provisions of the Code. In regard to the liability of one partner on the civil side of the court for the fraud of another partner in the course of the transactions and business of the partnership, the rule is so clearly stated in Story on Partnership, that we extract the entire section in which the rule is stated, and the reasons for it: "The principle extends further, so as to bind the firm for the frauds committed by one partner in the course of the transactions and business of the partnership, even when the other partners had not the slightest connection with, or knowledge of, or participation in the fraud; for (as has been justly observed) by forming the connection of partnership, the partners declare themselves to the world satisfied with the good faith and integrity of each other, and impliedly undertake to be responsible for what they shall respectively do within the scope of the partnership concerns. Hence, if, in the business of the partnership, money is received partly by one of the firm, and partly by another, to be laid out upon a mortgage, and a mortgage is forged by one partner without the knowledge of the other, the innocent partner will be liable for the whole money. So, if representations of certain facts as existing are fraudulently made by one partner, unknown to the others, in the partnership business, and the facts never existed, but the whole statement is a mere fiction, the firm will be bound to the same extent as if it were true and the facts existed. This whole doctrine proceeds upon the intelligible ground that where one of two innocent persons must suffer by the act of a third person, he shall suffer who has been the cause or occasion of the confidence and credit reposed in such third person:" Story on Partnership, section 108. The same author (section 168) in relation to the knowledge of the act of one partner by another partner, thus states the rule: "In

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spect to what acts of one partner the others will and ought to be held to have notice of, so as to bind them all by implied consent or acquiescence, it may be laid down as a general rule, for the protection of those who deal with partners, that if all of the partners have such knowledge and notice of the acts of any of their partners relative to their business, as in discharge of their plain duty they might or ought to have obtained." We find no error in the charge of the court in relation to the liability of the defendants as partners, so far as the money fraudulently received from the treasurer of the Western and Atlantic Railroad is concerned, and there is sufficient evidence in the record to sustain the verdict as to that branch of the case.

9. But the claim of McEwen, Grant & Company for \$5,995 40, which was allowed by the auditing board of commissioners, and directed to be paid to J. C. Alexander, and which was paid by the state treasurer, on an executive warrant, stands upon an entirely different footing as to the liability of the copartnership firm of J. M. & J. C. Alexander to pay it. There is no evidence that the copartnership had any dealings with the auditing board in the sale of goods or otherwise, but, on the contrary, the evidence shows that the draft and the bills on which it was founded, were fabricated by J. C. Alexander and Fry, wholly outside of and having no connection whatever with the business of the mercantile firm of J. M. & J. C. Alexander, and did not purport to have any connection with the business of that firm, nor does it appear that that firm received any part of the proceeds thereof. In our judgment, so much of the verdict as found the sum of \$5,995 40, the amount of the McEwen, Grant & Company draft, which was allowed by the auditing board, and paid out of the state treasury, against the defendants, as partners, was contrary to law and the evidence.

We therefore reverse the judgment of the court below in overruling the defendant's motion for a new trial, unless the plaintiff shall write off from the verdict the sum of \$5,995 40, with the interest on that amount; and in the event the plain-

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tiff shall do so, then the judgment of the court below will stand affirmed.

THE TYLER COTTON PRESS COMPANY, plaintiff in error, *vs.*
EMANUEL CHEVALIER, defendant in error.

1. A suit for damages for wrongfully turning off an employee, where the damage laid is within the jurisdiction of the court, will be maintained, though the damage shown by the plaintiff exceeds that amount, if the verdict be only for the sum within the jurisdiction.
2. When one count is for damages for the wrongful turning off of the employee and another on contract, and the proof shows the second count without the jurisdiction, the jurisdiction will be maintained on the first count, and the second will be considered merely auxiliary.
3. The return of the city court of Savannah to a writ of *certiorari* founded upon written exceptions made therein, is not subject to exceptions and traverse as returns of the justice courts are. The party excepting must put his exceptions in writing, and must also furnish the court a sufficient statement of facts proven to elucidate the exceptions; and the exceptions and facts, under the supervision and approval of the city court, make up the record and return, and on such record and return the case will be reviewed by the supreme court.
4. The presumption is that the city court will supervise and approve such a record of exceptions and facts as will fairly present the case for review; if the court should refuse or neglect to do so to the damage of any suitor or party, *mandamus* will furnish an adequate remedy.
5. An executed agreement to receive less than the amount of the debt due, by actual payment of the money agreed upon, can be pleaded as an accord and satisfaction, and will estop the party so receiving the money from asserting his claim to the balance.
6. Where the entire claim of the party suing for damages is in dispute, and therefore doubtful, the receipt of a part, on condition that the balance of the claim be abandoned, is of advantage to the plaintiff, and will be good as accord and satisfaction of the whole claim.

Jurisdiction. Damages. City Court of Savannah. *Certiorari*. Presumptions. Accord and satisfaction. Estoppel. Before Judge TOMPKINS. Chatham Superior Court. May Term, 1875.

Reported in the opinion.

R. FALLIGANT, for plaintiff in error.

R. R. RICHARDS, for defendant.

JACKSON, Judge.

1. This was a suit brought by Chevalier against the Cotton Press Company for the breach of a contract of hire. The question made by the record is in respect to the jurisdiction of the court. The suit was to the city court; its jurisdiction is limited to \$1,000 00, and the proof of the sum due plaintiff under the contract was over that sum. The declaration contained two counts; one for damages for turning plaintiff off, and the other on the contract. The jury found \$1,000 00. The law will presume that the verdict was upon the count which sustains the jurisdiction, if there be one. We think that the count for damages, the damages being laid at \$1,000 00, does sustain the jurisdiction. A plaintiff may lay a damage at what he pleases and can recover no more. So as the damage count goes, the verdict is, we think, good; and when the motion was made to dismiss, on the facts showing a larger amount of damage, it was properly overruled.

2. If the case had rested only on the second count, which set out the contract and was based upon it, we should have sustained the motion to dismiss; for, under the law, a plaintiff cannot reduce his demand resting on contract so as to confer jurisdiction: Code, section 3460; R. M. Charlton R., 298; Bay., 180; 2 McCord, 280. The motion being made when the proof showed the amount over the jurisdiction, was in reference as to that count: 13 Vermont, 175; but if one count be good, that is, in this case, if the damage count be sufficient to sustain the jurisdiction, the others will be held to be merely auxiliary, and the jurisdiction will be maintained: 6 Vermont, 91; 14 *Ibid.*, 296. We, therefore, hold that the city court had jurisdiction on the first count, and the case should have been retained on that count.

3. To the record from the city court, in which the facts in

obeyed orders. The question was did he obey orders. The proof was conflicting. If he did not obey he failed to comply with his contract, and could recover nothing. The consideration of his employment had failed. The money due up to the time of his discharge, or that he claimed to be due then, was as much in dispute as any other claim of his for his wrongful discharge. If he agreed to give up his whole claim if the company would pay him that part, he is bound by the agreement, and the city court should have so charged, and the superior court should have sustained the *certiorari* and granted a new trial on this ground. The Code settles the question. Section 2880 enacts that the accord and satisfaction must be of some benefit to the creditor to bind him, and that the securing a doubtful claim is such a benefit. Section 2881 declares that an agreement for less than the amount of the debt cannot be pleaded as accord and satisfaction "unless it be actually executed by payment of the money," etc. Here the money was paid. See, also, 3 *Kelly*, 310.

In respect to the right of the plaintiff to sue, we adhere to the rule in 8 *Georgia*, 191, *Rogers vs. Parham*, that a party wrongfully discharged from employment may sue for any special injury sustained *immediately*, or may wait till his term of service would have expired, and sue on the contract for all his wages, or may treat the contract as rescinded, and sue at once for work and labor done on a *quantum meruit*. We see no error in the city court in allowing the verdict to be corrected by the jury before their discharge. The legislature has now conferred the right on the city court of Savannah to grant new trials. It is not necessary, therefore, to pass upon the question of its right before that act. The remedy by *certiorari* was good in any view we might take of that subject. On the whole case, we hold that the court should have sustained the *certiorari* and granted a new trial on the ground that the city court erred in its charge that the agreement to give up the balance of his claim by Chevalier if the company, would pay him the sum of \$62 50, was *nudum pactum*, if Chevalier was wrongfully discharged, it being the opinion of

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this court that if such a contract was made, and the money paid, it was executed, and would bind the plaintiff.

Judgment reversed.

EVANS & RAGLAND, plaintiffs in error, *vs.* THE ATLANTA AND WEST POINT RAILROAD COMPANY, defendant in error.

1. The sayings of the agents of a railroad company are admissible and will bind the company, only when made in the particular business entrusted to them, and while engaged in that business.
2. Hence, to authorize the introduction as evidence of the written indorsement of the agents of a railroad company, upon a bill of lading referred from one agent to another, in respect to the condition of corn when received by the company sought to be charged with damage thereto, it must be shown that it is the business of such agents, entrusted to them by the company, to investigate the condition of the freight, and to indorse the result of their investigations upon such bill of lading.
3. For this purpose the agents of connecting roads may be the agents of the road sued, but the fact that the road sued is one of the connecting line, and under contract with the others in respect to the carriage of freight, must appear in order to make the agents of other companies its agents to do for the company last receiving the freight, and sued for the damages, what such agents are authorized to do for the other companies.
4. To bind "the last company which has received the goods as in good order," under section 2084 of the Code, there must be some proof that it so received them; and the written indorsement of the agent on the bill of lading, made some time after their reception, is not evidence unless accompanied with proof that it was his business so to act on reference of the matter to him.
5. Nor is a bill of lading, executed at St. Louis, Missouri, for corn "received in apparent good order on board good steamboat Emma C. Elliott, to be conveyed from St. Louis to Memphis, and from thence by the Memphis and Charleston railroad, with connecting railroads, to be delivered in like good order at the company's depot at LaGrange, Georgia," and signed by their agent, evidence to show the reception of the corn in good order by the defendant, unless it be proved that the defendant was one of the connecting roads under contract with the other and with the steamer, and thus bound by the act of the steamer's agent at St. Louis.
6. Upon proof that goods "in good order," or "in apparent good order," or "as in good order," are received on any railroad of a line in connection with which "the last company" runs its road, the presumption will arise that such condition of the goods continued up to the time when the last

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company received them, and the last company will be responsible to the consignee, unless it shows that the goods were not received by it in such good order, or apparent good order, but there must be some legal evidence to show either that the last company received the goods as in good order, or that some other railroad company connecting with it, so received them, and in the absence of any legal evidence of either fact, a non-suit was properly awarded—especially as in this case there was no proof that defendant received the corn from any other carrier, or how it was received, after the indorsement upon the bill of lading by the agent was rejected as evidence.

Principal and agent. Railroads. Evidence. Bill of lading. Before Judge HOPKINS. Fulton Superior Court. October Term, 1875.

Reported in the opinion.

JACKSON & LUMPKIN; THOMAS H. WHITAKER, for plaintiffs in error.

A. M. HAMMOND & SON, for defendant.

JACKSON, Judge.

This suit was brought for the recovery of damages to certain corn delivered at Saint Louis, Missouri, to a steamer, apparent good order, to be conveyed by the steamboat to Memphis, and thence by the Memphis and Charleston Railroad, and other connecting roads, to LaGrange, Georgia. The corn was delivered to the plaintiffs, who were the consignees, LaGrange, but was badly damaged. Suit was brought against the defendant, on the allegation that defendant was the last company which received the corn in good order, and was consequently responsible for the damage.

1, 2, 3. The bill of lading, with the indorsement of the agent of the defendant at Atlanta thereon, to the effect that the defendant received the corn from the Western and Atlantic Railroad in good order, was tendered in evidence and rejected, and the first question presented for review here is, was this indorsement by the agent, made some days after the corn passed through Atlanta, legal evidence to show that the



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defendant received the corn as in good order, so as to charge it with the damages as the last company which received it? If it was the duty of this agent to investigate how the freight was received, whether in good or bad order, and to report that fact on the bill of lading on inquiry by the agent at LaGrange, then we think this indorsement would be made "*dum fervet opus*"—in the very work entrusted to him by the company—and being so made in the business he was employed to transact, his sayings or writings, which are but written statements, would be admissible; but in the absence of proof that this was in the line of his business—that it was his duty to investigate and report thereon—the written statement on the bill of lading would be but the sayings of the agent in respect to a past transaction, and would not be admissible. In this case, the record does not disclose any proof that such investigation and report and indorsement was part of the business of this agent, and therefore the indorsement was properly rejected. In other states, there is some conflict in the authorities upon the subject, and also in the English Reports: 8 N. Y., 501, 509; 6 Gray, 450; 28 Eng. Com. Law, 275; 10 Eng. Law—all go to show that the sayings of the agents as to past transactions are admissible; but in Georgia, the question is not an open one. Section 2208 of our Code, and many decisions of this court, settle it beyond controversy: 6 *Georgia Reports*, 365; 19 *Ibid.*, 416; 29 *Ibid.*, 399, 461; 34 *Ibid.*, 330; 26 *Ibid.*, 111, and others. These Georgia cases and our Code confine the admissibility of the sayings of the agent to the business entrusted to him, and to the time while so employed, and exclude his sayings as to past transactions. In our state, they are admissible only upon the principle of being part of the "*res gestae*." It is clear, therefore, that the court rejected the indorsement of this agent and of the other agents, properly, because they spoke or wrote about past transactions, and there was no proof that it was their business to investigate these transactions and write or make statements about them.

4. The indorsement upon the bill of lading made by the

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of this company, and other companies connecting there-
 being properly rejected as evidence, no case is left for the
 juries except such as is made by the bill of lading, stripped
 indorsements, and the reception of the damaged corn
 at LaGrange. Its reception at LaGrange in a damaged con-
 dition, is certainly no proof that the defendant received the
 corn in good order at Atlanta. True, there are authorities
 to the effect, but we cannot concur in the principle ruled or in
 the reasoning which led to it: See note to Angell on Carriers,
 section 202, and cases cited. No presumption, we
 think, can arise that it was received in good order at Atlanta,
 the fact that it reached LaGrange badly damaged; if
 no presumption arose, it would seem the contrary, especially
 in this case, the damage is hid from sight.

The whole case, then, is narrowed to this point: does
 the receipt that the corn was in apparent good order, given by
 the agent of a steamboat at St. Louis, to be carried by water
 to Memphis and thence by rail to LaGrange, furnish any evi-
 dence, actual or presumptive, that the defendant received the
 corn in good order, or in apparent good order, or as in good
 order at Atlanta, Georgia? There is no evidence that the
 defendant was connected with the steamboat; that it was en-
 gaged by any contract with it or other roads and it, so as to
 make the agent at St. Louis who receipted the bill of lading
 for the steamer, in any sense the agent of defendant so as to
 bind the defendant. Our statute, section 2084 of the Code,
 makes the last company of *connecting railroads* liable; it is
 in respect to any connection with steamboats. And it
 seems to us that there is reason in this silence. Railroads
 are stationary, always to be found in the same place; steam-
 boats may be in one water one year, and another year a thou-
 sand miles off. Whilst, therefore, it is just to the consignee,
 and not unjust to the railroad carrier, to make the last com-
 pany responsible to the consignee, and force that company to
 look on its connecting lines for indemnity, to put the *onus*
 on such company to saddle the damage on the connecting
 line which caused it, it would be hardly just to apply the

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rule to a steamboat. The connecting road is immovable, it can always be found and sued; the boat is movable, variable, changeable in location, and not so easily found or sued; but we will not rule on this point.

6. Excluding the indorsements upon the bill of lading, there is no evidence that any of the connecting railroads received this corn in good order, or as in good order. If that fact had been proven, then the presumption would have arisen that the corn remained in that condition of good order from connecting road to connecting road until it reached defendant, and hence that it was received by defendant as in the good order in which it left the other roads; and such presumptive proof would have been sufficient to carry the case to the jury, and unless rebutted, to have authorized a recovery from the defendant. Such seem to be the authorities; and principle and practical good sense, and the convenience of the public, sustain them, we think. See 43 Barb., 225; 45 N. Y., 518; 28 Wis., 204. But this case, we think, breaks down from the fact that there is no positive proof that the defendant received this corn in good order, or as in good order, and no presumptive proof thereof by proof that *any road* with which it connected so received the corn, *nor any proof that it received the corn from any other carrier*. We must, therefore, after much deliberation and some hesitation, sustain the nonsuit and affirm the judgment, there being no legal evidence to show how, or from whom, or in what condition, this defendant received the corn alleged to have been damaged, after the indorsements upon the bill of lading were ruled out or rejected as evidence.

Judgment affirmed.

Warmock vs. The State of Georgia.

**MES WARMOCK, plaintiff in error, vs. THE STATE OF
GEORGIA, defendant in error.**

The court should not express the opinion to the jury that the facts (stating them) "make not a slight, but a strong circumstance from which they could infer that the pistol was concealed."

Counsel have the right to present their view of the law as well as the facts to the jury, especially in criminal cases, subject of course to the control of the court in the charge. Without this right, there can be no intelligent application of the law to the facts.

**Criminal law. Charge of court. Before Judge WRIGHT.
Applying Superior Court. September Term, 1875.**

Reported in the opinion.

**G. J. HOLTON ; D. M. ROBERTS, by brief, for plaintiff in
error.**

S. W. HITCH, solicitor general, for the state.

JACKSON, Judge.

The defendant was indicted and convicted of the offense of carrying concealed weapons. He moved for a new trial on the ground of two errors in the court on his trial:

First, that the court charged the jury "that when two men standing together face to face, one raising his hand from his side, exhibiting his pistol, and then dropping his hand, and the other did not see it before or after he raised it, having a fair chance to see it, it was not a slight but a strong circumstance from which they could infer that the pistol was concealed." We think that the court erred in this charge on the authority of the case of *Stephenson vs. The State*, 40 *Georgia Reports*, 291. That case covers this all over.

The second error assigned is, that the court erred in not allowing counsel to present his view of the law of the case to the jury, but interrupted him, and said that matters of law could be argued to the court, and facts to the jury. We have ruled at this term that in a civil case counsel have a

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right to present their views of the law so as to discuss the facts intelligently to the jury, and we ruled at the last term that counsel could, in the hearing of the court and subject of course to his correction in the charge, read and comment on law to the jury in a criminal case: See *Ransone vs. Christian*, page 353; *McMath vs. The State*, 55 *Georgia Reports*, 303. We think the court erred in withholding this right.

Let the judgment be reversed.

ELLIS & PALMER, plaintiffs in error, *vs.* JAMES A. JONES & COMPANY, defendants in error.

1. In refusing the injunction prayed for, the judge acted within the scope of his legal discretion and did not abuse it.
2. A contract not to carry on a certain trade within the limits of a certain town, if clearly made out, will be enforced. (R.)

Injunction. Contracts. Before Judge WRIGHT. Mitchell County. At Chambers, January 31, 1876.

Ellis & Palmer filed their bill against Jones & Company, in which they alleged that they had purchased the defendants' stock of merchandise, consisting of dry goods, groceries, etc., their store-house containing the same, their custom, good will and right to do business in the town of Camilla, in the county of Mitchell, for the sum of \$7,500 00; that said defendant, in violation of said contract, had recommenced the same business within twenty-four feet of their old stand, and if allowed to proceed would greatly damage complainants. They prayed the writ of injunction.

The defendants answered, denying in the most positive terms the contract set forth in the bill. Numerous and conflicting affidavits were read in support of the bill and answer respectively.

The chancellor refused the injunction and complainants excepted.

Hacker & Maloney vs. Groover, Stubbs & Company.

s H. SPENCE, for plaintiffs in error.

s & LYON, for defendants.

KLEY, Judge.

Judge below, on the bill, answer and affidavits, refused action prayed for. In so doing he exercised the discretion with which he is invested by law, and we do not perceive that he abused it. The case was rather vague, and the court might have well supposed that there was not that full degree of certainty in the facts which would demand his intervention by the remedy of injunction. If he had ruled the other way, we should not have reversed him, nor shall we reverse what he did rule. It does not appear that he held the contract alleged in the bill to be invalid because in restraint of trade. We think such a contract can be enforced, especially if made out by evidence: 10 *Georgia Reports*,

reference to the fraud in pricing the goods, there seems to be no necessity for injunction on that account, as the defendants are not insolvent. Judgment affirmed.

HACKER & MALONEY, plaintiffs in error, vs. GROOVER, STUBBS & COMPANY, defendants in error.

It was had in the city court of Savannah in July, 1872, at which certifications were taken as a basis for an application for the writ of *certiorari*. On the 17th of the same month, the writ of *certiorari* was ordered. The case returnable to the January term, 1873, of the superior court. The judge having made no return, on March 5th, 1875, the defendants obtained a *mandamus* requiring him to certify and send up the proceedings in the case, to which he answered that he could not comply with the order because the facts of the case had passed from his recollection, the trial having taken place several years ago, and no statement of the facts having been filed or entered for his approval in accordance with the usual practice. UNL. LVI. 33.

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der these circumstances, on July 31st, 1875, plaintiffs moved to dismiss *certiorari*:

Held, that this motion was properly overruled as the defendants had not been called upon by rule to show cause why their *certiorari* should not be dismissed.

2. When a party to a cause in the city court of Savannah excepts to any proceeding affecting the real merits of the case, he must file with such exception, a just and true statement of the facts relating thereto, and of all legal points arising therein, subject to the approval of the judge.
3. To order the case sent back to the city court for a new trial was error.

Practice in the Superior Court. *Certiorari*. New trial. City Court of Savannah. Before Judge TOMPKINS. Chatlam Superior Court. May Term, 1875.

Reported in the decision.

RUFUS E. LESTER, by brief, for plaintiffs in error.

HOWELL & DENMARK, for defendants.

WARNER, Chief Justice.

It appears from the record, that at the July term of the city court of Savannah, a case was tried in which Hacker & Maloney were plaintiffs, and Groover, Stubbs & Company were defendants, and that a verdict was rendered in favor of said plaintiffs against the defendants; that exceptions were taken thereto, and overruled by the court on the 17th of July, 1872; that on that day, the defendants applied to the judge of the superior court for a writ of *certiorari*, which was sanctioned and directed the city judge to certify and send up to the superior court the proceedings in said case, to the January term, 1873; that service of said writ was acknowledged by the city judge on the 22d of August, 1872, and notice thereof given to the plaintiffs' attorney. The city judge had made no return to the writ of *certiorari*, and on the 5th of March, 1875, the defendants obtained from the judge of the superior court a *mandamus* against the judge of the city court requiring him to certify and send up the proceedings in

In the case, to which the judge of the city court answered that he could not comply with the order of the court, inasmuch as the facts of the case had gone out of his recollection, the case having been tried some years ago, and no statement of the facts having been filed or presented for approval according to the practice of the city court of Savannah, which answer was not traversed, nor any further proceedings taken upon the *mandamus*. On the 31st of July, 1875, the plaintiffs' attorney made a motion to dismiss the *certiorari*, which the court overruled. The defendants' attorney then made a motion that the case be sent back for a new trial in the city court, which motion the court granted, and ordered a new hearing of the case, and gave judgment against the plaintiffs for the costs in the superior court; whereupon the plaintiffs excepted.

1. There was no error in refusing to dismiss the *certiorari*. Before the plaintiffs were entitled to have had that motion granted, in view of the *special facts* of this case, they should have first obtained a rule calling upon the defendants to show cause why their *certiorari* should not be dismissed, upon reasonable notice thereof.

2. When a party to a cause in the city court of Savannah makes exceptions to any proceedings in a suit in that court affecting the real merits of the same, as provided by the 58th section of the Code, it is the duty of the party so making such exceptions, to file at the same time a just and true statement of the facts relating thereto, as well as the legal points arising thereon, subject to the approval of the city judge, and such we understand from the answer of the city judge to have been the practice in that court. The party excepting for the purpose of obtaining a *certiorari* failed to file any statement of facts at the time of filing the exceptions, and was therefore the party in default.

3. We are not aware of any law which would have authorized the court to order a new trial in the case on the statement of facts contained in the record. The object and purpose of the defendants in their application for a *certiorari* was to obtain a new trial, and by their own default they have ob-

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tained one under the order of the court, without a hearing upon their *certiorari*.

Let the judgment of the court below be reversed.

WRIGHT W. HARRELL, plaintiff in error, vs. HANNUM & COLEMAN, defendants in error.

1. Citizens generally have no strict right of common of pasture in the "woods," or upon the unenclosed lands of others; and an injunction will not be granted to restrain land-owners or other persons from unlawfully firing the woods at undue seasons of the year, to the injury or destruction of the range for cattle, where the injunction is applied for by a proprietor of cattle who rests his bill upon the right of common of pasture, but shows no right other than that enjoyed, or which might be enjoyed alike by the public in general.
2. If equity will, in any case, restrain a breach of the law which restricts the firing of the woods to the months of February and March, will it do so where the system of burning complained of is a few acres at a time, and where cause for penal actions and criminal prosecutions on account of past execution of the system has already happened, and the complainant does not show by his bill that he has either sued or prosecuted the defendants for their past acts? *Quære?*

Injunction. Common of pasture. Before Judge PATE.
Dodge County. At Chambers. January 8th, 1876.

Reported in the opinion.

L. A. HALL, for plaintiff in error.

J. F. DELACEY, for defendants.

BLECKLEY, Judge.

This case presents a contest over cattle and turpentine. The herdsman makes a stand against the aggressions of the manufacturer. The man whose vocation it is to turn the herbage into beef rises up against the man who seeks to convert the trees into turpentine. The disputed element is fire. Fire is the friend and ally of him who seeks after turpentine.

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the mortal enemy of him who rejoices in the possession of his cattle. The one ranges the forest with his brands of ownership; the other, in alarm, cries fire! and clamors for its extinction by a court of equity. And equity, it seems, finds this a difficult business. The fire department of the court is very indifferent. It is wanting in hooks and ladders, engines and other appliances, and has no water works. How equity is to put out fire, or to prevent it from spreading, is more than we know, without some thoughtful consideration. The complainant, however, is in court with his application for aid in the writ of injunction; and that is a writ which has arrested many things, and may possibly arrest fire itself. Let us see.

1. Looking first to the mere power of the court to meddle with the matter, equity cannot interfere to save property, even in cases of conflagration, without he who applies for its aid shows that he has an interest in what is about to be burned. The right alleged must be one which the law recognizes as property. The complainant has made an effort to comply with this indispensable condition by averring that he has, in the woods in question, the right of common of pasture for his cattle, which are numerous, and which have been accustomed to range in those woods heretofore. The position of the bill is not that the burning is a nuisance because the cattle will be there, to their injury, and cannot be prevented from browsing on the impoverished burned patches, so long as the lands are left unenclosed, but that it is the complainant's right for them to be there in the woods and enjoy pasture. This is substantially what is alleged on the subject of his title; and we are constrained to say that it is wholly insufficient. He does not set forth any contract, prescription or other lawful basis for the right he claims. He presents no state of facts showing it to be a right in him to pasture his cattle there, which would not have equal validity in favor of all mankind. For aught that we can see in his bill, all the inhabitants of Georgia, at least, might claim with him a similar and co-equal privilege. His vastness of extent as to the number of beneficiaries might

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hold as to some matters; such, for instance, as the public roads, the navigable rivers, etc., but not, we apprehend, as to common of pasture upon lands which are all private property. For the right to be in anybody it is essential that it should not be in everybody. What belongs to the world at large, is no man's in particular: 51 *Georgia Reports*, 74. It will be already clear that in our judgment, a court of equity cannot visit the scene of the fire at the complainant's instance. He is, legally speaking, a mere spectator of whatever destruction may happen to the grass in that region, unless he shall choose to change his forum and try penalty instead of injunction.

2. It is an act which subjects the perpetrator both to penal action and to indictment, to burn the woods, except within the time, and after the notice prescribed by law: See Code, sections 1456, 1457, 1458. From the record before us it appears that the defendants, for the benefit of their turpentine business, act upon a system in firing the woods, and have already had one or more burnings of a few acres, in part execution of that system. Even if the complainant had the right of common which he claims, it would be a grave question whether, in view of the apparently adequate resources which the Code affords by suit and indictment, the complainant would not be left to the risk of future fires until he had tried to prevent them by suing and prosecuting for those of the past. Judgment affirmed.

ARCHIBALD GILMORE, plaintiff in error, *vs.* CHRISTOPHER MURPHY, defendant in error.

1. Where a plea is so indefinite and uncertain as to render it impossible for the court to pronounce the judgment of the law thereon, a demurrer thereto should be sustained.
2. Where the question at issue is whether a business, nominally conducted in the name of a firm, was, at a certain time, really the property of one of the alleged members, newly discovered evidence to the effect that each one of the apparent partners had told a witness several years after the time it

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which the fact was material, that whilst they did business as a firm, yet, in reality, one of the alleged partners had no interest therein, is no ground of new trial.

Pleadings. New trial. Before Judge TOMPKINS. Chattahoochee Superior Court. May Term, 1875.

One of the grounds of the motion for new trial was that newly discovered evidence, to the effect that Murphy and Clark had each told one Mills, in July, 1873, that the latter had no interest in the business of Murphy & Clark, but simply received wages as an employee. The mortgage sought to be foreclosed was executed on January 26th, 1871. The usual supporting affidavits were attached.

For the remaining facts, see the decision.

RUFUS E. LESTER, by brief, for plaintiff in error.

GEORGE A. MERCER, by brief, for defendant.

WARNER, Chief Justice.

C. Murphy, the plaintiff in the court below, petitioned for the foreclosure of a mortgage executed by A. Gilmore, and claimed that \$1,680 00, besides interest, etc., was due. Gilmore filed, first, a plea of partial payment, which was allowed. Plaintiff moved to strike all that part of defendant's plea which followed the first plea of partial payment. The court, after argument, sustained the motion. The plea so stricken alleged that Murphy, in consideration that Gilmore would agree to do for the firm of Murphy & Clark, of which Murphy was a member, the ornamental and sign painting for the said firm, that he (Murphy) would pay the purchase money of the said land, and would also take half of the land himself, and would give to Gilmore time to pay for the said land until the amounts with which he was to be credited for his work by the said Murphy & Clark, should be sufficient to reimburse the said Murphy; that in pursuance of said contract, Gilmore went to work for the said Murphy & Clark, and

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rendered service to them to the amount of \$1,653 74; that the said Murphy & Clark were entitled to charge against him (Gilmore) the sum of \$1,046 27, for advances and payments made to him, (Gilmore,) leaving a balance in his favor of \$607 47, due him by the said firm of Murphy & Clark. And Gilmore claimed the right to set off this balance against the debt due C. Murphy individually. Gilmore also pleaded that Murphy had damaged him to the extent of \$1,200 00—in this, that the said Murphy & Clark, through the said Christopher Murphy, failed to supply him (Gilmore) with a large part of the work which they agreed for him to do, but employed others to do the work, thus keeping him unemployed, and depriving him of the opportunity of working out the payment for the said land in the manner agreed on. And said Gilmore claimed the right to recoup this damage against the debt due Murphy.

The jury found a verdict in favor of the plaintiff. The defendant made a motion for a new trial on the ground that the court erred in sustaining the demurrer to the second and third pleas of the defendant and ordering the same to be stricken, and for newly discovered evidence, which motion was overruled, and the defendant excepted.

1. The defendant did not allege in his plea at what time the alleged agreement was made nor within what time it was to be performed. Whether the alleged agreement was in writing, or by parol, or whether it was to be performed within one year or not, the plea did not state, nor was there any bill of particulars annexed thereto specifying the amount of work done by the defendant, nor was it alleged that the plaintiff agreed to credit the amount of the defendant's work on his mortgage. The pleas of the defendant were entirely too indefinite and uncertain to enable the court to pronounce the judgment of the law thereon. Good pleading consists in a logical statement of facts upon the record in view of the law applicable thereto.

2. The newly discovered evidence relates to what Murphy and Clark told the witness, Mills, in July, 1873, in regard to

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air being partners at that time, whereas the note and mortgage was made in January, 1871. We find no error in overruling the motion for a new trial on the statement of facts closed in the record.

Let the judgment of the court below be affirmed.

LUMBUS W. DISMUKES, administrator, plaintiff in error,
vs. **MARY JANE PARROTT**, defendant in error.

An instrument, in form a deed of gift and well attested as such, but not legally attested as a will, so that it would wholly fail of effect if construed to be testamentary in its character, should, if very doubtful in its terms with reference to the time of vesting the estate, be classed as a deed and not as a will.

An indenture, signed, sealed and delivered by a father, in presence of two attesting witnesses, giving and granting certain land to his daughter, in consideration of love and affection, to have and to hold the same after his death, during her natural life, he reserving the right of controlling the premises as long as he lived, and expressing a desire that at her death the property should be sold and divided between his other children, vested, at the time of its execution and delivery, an estate for life in the daughter, subject only to the father's right of possession, use and enjoyment during his own life.

Deed or will. Before Judge CLARK. Webster Superior Court. September Adjourned Term, 1875.

Reported in the opinion.

ALLEN FORT ; L. C. HOYLE, for plaintiff in error.

HAWKINS & HAWKINS, for defendant.

BLECKLEY, Judge.

The action was by the administrator of the donor against the donee in the following instrument; and the only question for decision is, whether the instrument is a testamentary paper or a deed:

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“GEORGIA—WEBSTER COUNTY :

“This indenture made this 6th day of January, 1873, between William H. Dismukes, of said county and state, of the one part, and Mary Jane Parrott, his daughter, of the same place, of the other part: witnesseth, that the said William H. Dismukes, for the love and affection that he has for his daughter, Mary Jane Parrott, has given and granted, and does by these presents give and grant unto the said Mary Jane Parrott, all that tract of land constituting his residence in said county. To have and to hold the aforesaid premises after his death during her natural life. The said William H. Dismukes reserves the right of controlling the aforementioned premises as long as he lives. William H. Dismukes desires that the aforementioned premises, at the death of the said Mary Jane Parrott, be sold and divided between the balance of his children.

W. H. DISMUKES, [Seal.]

“Signed, sealed and delivered in the presence of

“MARK HOLLOMON,

“PETER W. REDDICK, *N. P. and ex of. J. P.*”

It is not easy to say what this instrument is. It has the form and general requisites of a deed, including attestation. Construed as a deed, it would have validity and take effect; construed as a will, it would be a nullity, as it has but two witnesses, and the law requires three. We do not certainly know what it is. Its construction is very doubtful. Taking all its terms together, it would seem that the grantor intended to pass something presently, for he defines what it was his purpose to reserve, namely: the control during his own life. By control, he most probably meant possession, use and enjoyment; not absolute title, with power of disposition beyond the term of his own life. To hold the instrument to be a will would be to make the reservation altogether idle and useless. By holding it to be a deed, effect can be given to the reservation as a part of the instrument—to all the words, without rejecting any as superfluous. This, we think, is the safer and better construction. It is the one which was adopted by the court below, and we

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not convinced that the court erred. Numerous cases on the general subject have been heretofore decided by this court; but it is unnecessary to cite them. We have not omitted to examine them.

Judgment affirmed.

AXIME J. DESVERGERS et al., plaintiffs in error, *vs.* **FRANCIS M. WILLIS**, administrator, defendant in error.

It is held that there exists a public road upon land which was known to the vendee at the time of the purchase, does not constitute a breach of a covenant of warranty against incumbrances.

Warranty. Roads. Before Judge **TOMPKINS**. Chatham Superior Court. May Term, 1875.

Reported in the decision.

RUFUS E. LESTER, by brief, for plaintiffs in error.

HOWELL & DENMARK, for defendant.

WARNER, Chief Justice.

The plaintiff, as the administrator of **W. F. Willis**, sued the defendants on a promissory note given by them to his intestate for the sum of \$833 33. The defendants pleaded that the note was given for a part of the purchase money of a certain described tract of land purchased by them of the plaintiff's intestate in his lifetime, who, by his deed of conveyance of said land to them, covenanted and warranted the title hereto to be free and discharged of, and from all manner of incumbrances whatsoever. The defendants allege that said covenant was broken in this, that at the time of making said deed the said bargained premises were not free from incumbrances, but on the contrary, before the making of said deed, for a long time, there had been, and then was, and ever since

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hath been, a public road running through said land, to the use of which road the public generally had at that time acquired, and have continued to exercise, this right, which defendants are unable to prevent, to their damage, \$1,000 00. The jury, under the charge of the court, found a verdict for the plaintiff for the full amount of the note. The defendants made a motion for a new trial on the several grounds therein set forth, which the court overruled, and the defendants excepted.

The court charged the jury "that if the defendants knew, at the time of the purchase of the land, that there was a road existing upon it, either a public or a private road, they cannot avail themselves of the warranty against incumbrances." A general warranty of title to land against the claims of all persons includes in itself covenant of a right to sell, and of quiet enjoyment and of freedom from incumbrances: Code, section 2603. The question made by the record in this case is, whether a public road on the land, which fact was known to the purchaser at the time of his purchase, is, in this state, a breach of a covenant of warranty against incumbrances? The decisions of the courts of this country are not uniform upon this question, but the weight of authority, we think, is that the existence of a public road on the land, known to the purchaser, is not such an incumbrance as would constitute a breach of the covenant of warranty. This view of the question is sustained by the better reason, especially as applicable to the condition of the people of this state. To hold that a public road running through a tract of land, which was known to the purchaser at the time of his purchase thereof, is such an incumbrance on the land as would constitute a breach of a covenant of warranty against incumbrances, would produce a crop of litigation in this state that would be almost interminable. It is true that the court charged the jury if there was a private road on the land, that would not be a breach of the warranty against incumbrances, but that part of the charge did not hurt the defendants, inasmuch as they admitted in their plea that the road on the land in controversy was a public road. Whether a private road on land

ould be a breach of a covenant of warranty against incumbrances, we express no opinion. The court submitted the question as to the fraudulent representations made by the endor to the jury, and they have passed upon it. If the evidence had clearly shown that it was the intention of the parties at the time of the purchase of the land that the defendants would have the right to stop up the road, and that the warranty was made expressly in view of that fact, it would have presented a different question. The only evidence in the record on that point is that Willis told Richards (who was Willis' agent to show the land to any one who might desire to look at it with a view to purchase,) that he might run his fence across the road, that it was only there for convenience, and that he told one of the defendants when he came to look at the land what Willis had told him, that any one purchasing the land might close up the road. In view of the evidence disclosed in the record, and the charge of the court applicable thereto, we find no error in overruling the motion for a new trial.

Let the judgment of the court below be affirmed.

ESSE L. BLALOCK, plaintiff in error, vs. M. M. TIDWELL, executor, defendant in error.

Judgment rendered in 1874, in a suit commenced in 1856, cannot be set aside for a clerical mistake in the process, the original defendant having appeared at the first term after the declaration was filed and pleaded to the merits of the action; his executor, on being made a party, having also pleaded to the merits; and no suggestion of any defect in the process having been made until after verdict and judgment, eighteen years posterior to the first appearance and plea.

Even before the adoption of the Code, appearance and pleading to the merits waived service.

Judgments. Waiver. Pleadings. Service. Process. Before Judge BUCHANAN. Fayette Superior Court. August Term, 1875.

Reported in the opinion.

J. L. BLALOCK; DORSEY & BRADY, by B. F. LONGLEY,
for plaintiff in error.

No appearance for defendant.

BLECKLEY, Judge.

The declaration was filed on August 26th, 1856. The clerk issued process returnable to the superior court to be held "on the third Monday in September next," and dated it September 27th, 1856. No return of service was made by the sheriff, and there was no acknowledgment or written waiver of service. At September term, 1856, the defendant appeared by attorney and pleaded the general issue. He died, and his executor was made a party. The executor appeared and pleaded the general issue, and a special plea to the action. At August term, 1874, a verdict was rendered for the plaintiff, and judgment thereon was duly entered up and signed. After all this, the executor moved the court to set aside and vacate the judgment, on the ground that the process bore date on the 27th of September, 1856, and required the defendant to appear at the superior court to be held "on the third Monday in September next;" and on the ground that there was no return, acknowledgment or waiver of service. The court granted the motion, at August term, 1875, and passed an order setting aside and vacating the judgment.

1. The early rulings of this court on the subject of process were very strict: See 6 *Georgia Reports*, 41; 13 *Ibid.*, 217; 16 *Ibid.*, 194; 17 *Ibid.*, 67; 20 *Ibid.*, 225, 398. Looking back upon them, some of the judges doubted whether they were not overstrict; 22 *Georgia Reports*, 358; 27 *Ibid.*, 263. The amendment act of 1853-4, most probably had some influence in softening the construction, or rather the application of the act of 1799. In *Irwin vs. McKee*,²⁵ *Georgia Reports*, 646, the head-note is, "Too late to object to process after party has appeared, confessed judgment, and en-

in appeal." That case was very similar to the present. The process was dated April 1st, 1856, and required appearance "on the third Monday in April next." The defendant having confessed judgment and entered an appeal, moved, on appeal trial, to dismiss the cause on account of defect in the process. The motion was denied. In affirming the judgment, Judge McDONALD, speaking for the court, said: "The process was amendable by statute; but if it had not it had the effect of all process, for the defendant appeared and defended."

Townsend vs. Stoddard, 26 *Georgia Reports*, 430, the note reads thus: "Declaration amendable, being substantially correct; process calling party to wrong day, also amendable if defendant appeared at the time fixed on for the trial and moved in the case." The process required appearance on the second Monday in April, when the time fixed by the court holding the court was the fourth Monday. There was some defect in the declaration, and the court allowed both to be amended. In the opinion delivered by Judge McDONALD, he said they were both amendable by statute, and that the defendant's appearance (he having made a motion in the case as well as appeared) was a waiver of defects and errors in the process calling him to the court.

On the authority of these two cases we think we are well warranted in holding that the motion to set aside the judgment in the case at bar ought to have been denied. The original defendant appeared and pleaded at September term, 1856. It is clear enough that that was the term to which the process was meant to be returnable. The mistake, doubtless, was in dating the process, the word "September" having been put in place of the word "August." Besides, the case remained in court until long after the full day-light of amendment had dawned upon our law by the adoption of the Code; it would be strikingly out of harmony with the times if tried in 1874, after eighteen years of lingering or of confusion, had to go down and be forever lost because of a small defect in the process. As Judge LUMPKIN said in

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Tatum vs. Allison, 31 *Georgia Reports*, 337, "the time for such trifling is past."

2. The ground of the motion which attacks the proceeding for want of formal service, is clearly insufficient. There was double the appearance and pleading requisite to supply the place of service: 11 *Georgia Reports*, 20; 13 *Ibid.*, 217; 14 *Ibid.*, 587.

Judgment reversed.

W. WOODS, ordinary, plaintiff in error, vs. E. C. JONES, defendant in error.

1. Generally a judgment of reversal embracing no special directions, simply vacates the judgment excepted to, and is to be followed by a new trial in the court below: 15 *Georgia Reports*, 653.
2. After a judgment in favor of a creditor upon a money rule against the sheriff has been reversed, on the ground that the creditor's lien is not superior, but inferior, to a competing order setting the fund apart for the debtor's family under the homestead and exemption laws, the creditor, upon the new trial, may still attack the order as void for want of jurisdiction in the ordinary when it was granted, that question not having been made on the first trial nor passed upon by the supreme court. In such a case the validity of the order is not *res adjudicata*, but only its priority as compared with the creditor's lien.
3. There being (as held in the case of *Pate vs. The Oglethorpe Company*, 54 *Georgia Reports*, 515,) no provision of law for setting apart a second or supplemental homestead, etc., the second order of the ordinary is without jurisdiction and void.
4. A first application which has been granted and approved is not void because the applicant did not allege, in terms, that he was the head of a family, when the application shows on its face that it was made "for the use and benefit of his family," and when the same creditor, who is now a party before the court, appeared and filed objections on other grounds, but none on this ground.

The ordinary's approval at the close of the homestead or exemption application, as duly recorded in the clerk's office, will be construed as applying to the application, and not to objections filed by a creditor, although the objections be set out in the record between the application and the entry of approval.

gments. New trial. Practice in the Supreme Court. *estead.* Debtor and creditor. Before Judge BARTLETT. an Superior Court. September Term, 1875.

January 31st, 1870, one James R. Martin applied to ordinary of Bartow county for an exemption of person-to be set apart for the use and benefit of his family, the specified aggregating in value \$669 25. E. C. Jones ted upon the ground that the applicant, in the year 1869, ed into a contract with him, binding all this personal erty, to secure the payment for provisions furnished to plicant to enable him to raise his crops during that year. e record is presented here, following this objection is pproval of the ordinary.

December 30th, 1872, Martin filed his petition with ordinary of Morgan county, in which he set forth the said proceedings in Bartow, and also that he had since ne a citizen of Morgan; that he was the head of a fam- on- sisting of a wife and six children; that the exemp- llowed by the ordinary of Bartow county did not amount ,000 00; that he has in the hands of Antoine Poullain, out \$200 00, which he prays may also be exempted to

On the day appointed for the hearing the applicant ded his petition by setting forth other items of person- to be exempted, amounting to \$187 00, and by annex- . schedule thereof, as well as of the money in the hands oullain.

pon this petition the ordinary ordered that the personalty in specified be set apart as exempt, and that the \$200 00 vested in any personalty desired by the petitioner.

January 30th, 1874, Martin again petitioned the ordi- , setting forth the proceedings aforesaid, for the exemp- of an execution for \$100 00, with interest, which he had ned against one Henderson Taylor. This was also al- d.

otice having been served upon Antoine Poullain, jr., to ver the fund in his hands to the ordinary, for the pur- VOL. LVI. 34.

Woods vs. Jones.

pose of investment for the benefit of Martin and family, he declined upon the ground that process of garnishment had been served upon him at the instance of Jones. At the September term, 1874, of the superior court, Poullain, under direction of the court, paid over the amount due Martin to the sheriff, to be held subject to further order. Jones, having obtained judgment against Poullain, as garnishee, and placed the execution issued thereon in the hands of the sheriff, obtained a rule against the sheriff, requiring him to show cause why such fund should not be paid over to him. To this proceeding the ordinary, for the use of Martin and his family, was made a party. The sheriff answered that he had been served with notice by said ordinary that he claimed such fund for the use of the wife and minor children of Martin, to be invested under the exemption laws.

The court ordered the fund to be paid to Jones, and the ordinary excepted. This judgment was reversed by the supreme court at the January term, 1875, "on the ground that the court erred in ordering the money in the sheriff's hands to be paid in satisfaction of the *fi. fa.* in favor of Jones against Martin, on the statement of facts disclosed in the record." When the *remittitur* was made the judgment of the superior court, the ordinary moved an order directing the sheriff to pay the fund over to him in accordance with the decision of the supreme court. Jones objected upon the ground that the only right which the ordinary had to such fund was based on a second or supplemental homestead granted to Martin without authority of law. The ordinary replied that such objection was covered by the judgment rendered by the supreme court, as it disposed of the fund; that as this point had not been insisted on in the first instance, it was too late to rely upon it now.

The court sustained the objection, and again ordered the fund to be paid to the *fi. fa.* in favor of Jones. To this judgment the ordinary excepted.

McHENRY & McHENRY, for plaintiff in error.

 Daniel vs. Donaldson.

SEABORN REESE, for defendant.

BLECKLEY, Judge.

The reporter's statement will give the facts, and the headnotes the law, of this case. It will be noticed that the second hearing in the court below was not on exactly the same evidence as the first. But without that difference, it would be the sounder ruling to hold, as we do, that a defect rendering suitor's title to a fund *void*, would not be presented too late at any active stage of the case prior to its final disposition. Such an objection should be heeded so long as the fund in contest is within the power of the court, unless it has already been considered, and some direct ruling made upon it.

Judgment affirmed.

EDWARD F. DANIEL, plaintiff in error, vs. JOSEPH DONALDSON, defendant in error.

- . The clerk's certificate to the bill of exceptions cannot be waived. In its absence, the writ of error will, on motion, be dismissed. (R)
- 1. The certified transcript of the record cannot be waived. If not forwarded to this court by direction of counsel, the writ of error will, on motion, be dismissed. (R.)

Practice in the Supreme Court. Waiver. Certificate. Record. Before the Supreme Court. January Term, 1876.

This case came up upon what purported to be the bill of exceptions. This paper appeared never to have been filed in the clerk's office of the superior court. No certificate of the clerk was appended thereto. Upon it was the following agreement:-

"I acknowledge complete service of notice that this bill of exceptions has been signed and certified according to law, and waive copy and all other notice or service; and as this bill contains all the record necessary to a proper hearing of the case, we agree that the case may be heard and determined in and

Lee vs. Anderson.

by the supreme court on this bill of exceptions alone, without further record or certificate of any officer, and without filing the same in the clerk's office of Cherokee superior court. This 31st March, 1875.

(Signed)

"IRWIN & ANDERSON,
" *Defendant's Attorneys.*"

No transcript of the record was forwarded.

When the case was called, counsel for defendant moved to dismiss the writ of error upon the ground that the paper purporting to be the bill of exceptions was not certified by the clerk, and because no transcript of the record accompanied the same.

The motion was sustained on both grounds.

GEORGE N. LESTER; JAMES R. BROWN, for plaintiff in error.

IRWIN & ANDERSON, by Z. D. HARRISON, for defendant.

AUGUSTUS H. LEE, executor, plaintiff in error, vs. LEMUEL B. ANDERSON, assignee, defendant in error.

1. Where the bill of exceptions is forwarded without a certified transcript of the record, though it may have embraced in it a full copy of such record, the writ of error will be dismissed. (R.)
2. There being no authentic portion of the record here, a suggestion of a diminution thereof cannot be allowed. (R.)
3. A case dismissed for want of a certified transcript of the record will not be reinstated upon the production of the receipt forwarded by the clerk of this court to the clerk of the superior court stating that the bill of exceptions and transcript had been received, accompanied by the certificate of the latter officer to the effect that from such receipt, he believed he had forwarded such transcript. (R.)

Practice in the Supreme Court. January Term, 1876.

The above head-notes report this case.

J. J. FLOYD, for plaintiff in error.

CLARK & PACE, for defendant.

Hallett, Seaver & Burbank *vs.* Blain & Harris.

***HALLETT, SEAVER & BURBANK**, plaintiffs in error, *vs.*
BLAIN & HARRIS, defendants in error.

Where proceedings had before a justice of the peace are brought up for review by writ of *certiorari*, and no question of fact is involved, it is the duty of the superior court to render a final judgment in the case, without sending it back to the lower tribunal.

WARNER, Chief Justice.

SQUIRE UNDERWOOD, plaintiff in error, *vs.* **THE STATE OF GEORGIA**, defendant in error.

GEORGE FAVER, plaintiff in error, *vs.* **THE STATE OF GEORGIA**, defendant in error.

FIELDS, WITHERSPOON & COMPANY, plaintiffs in error, *vs.*
DEMORE & COMPANY, defendants in error.

The verdicts in these cases are sustained by the testimony.

DUDLEY P. JACKSON, plaintiff in error, *vs.* **GILBERT M. BYNE**, defendant in error.

The granting of an injunction without notice to the party sought to be enjoined, is in violation of section 3211 of the Code.

WARNER, Chief Justice.

JOHN T. BURKHALTER, plaintiff in error, *vs.* **JOHN W. BAKER**, defendant in error.

Where upon the trial of a possessory warrant, the right to the possession of the property turned exclusively upon the evidence, and no error of law is complained of, the decision of the magistrate will not be reversed.

WARNER, Chief Justice.

* No reports or opinions are published in this and the following cases, in accordance with the provisions of act of March 2d, 1875. (R.)

Garvin *vs.* Wheelchel.

A. L. GARVIN, executor, plaintiff in error, *vs.* A. M. WHEELCHEL, defendant in error.

Contracts entered into after June 1st, 1869, though in renewal of obligations bearing dates anterior thereto, are not within the provisions of the limitation act of 1869.

WARNER, Chief Justice.

JOSEPH F. DOUGLASS *et al.*, plaintiffs in error, *vs.* PHILIP FITZGERALD, defendant in error.

Where the facts are complicated, and the appointment of a receiver and granting of an injunction will protect the rights of the respective parties, the discretion of the chancellor will not be controlled.

WARNER, Chief Justice.

MARTHA M. GIRARDEY *et al.*, plaintiffs in error, *vs.* ANDREW M. MOORE *et al.*, defendants in error.

W. A. GREGORY, plaintiff in error, *vs.* WILLIAM A. RAWSON, defendant in error.

This court will not interfere to control the discretion of the chancellor in granting, or refusing to grant, injunctions, when no rule of law or well established principle of equity has been violated.

WARNER, Chief Justice.

The Summerville, etc., Company *vs.* The Augusta, etc., Company.

**THE SUMMERVILLE MACADAMIZED, GRADED, OR PLANK
ROAD COMPANY, plaintiff in error, *vs.* THE AUGUSTA
LAND COMPANY, defendant in error.**

On an application for an injunction to restrain trespass, this court will not control the discretion of the court below in refusing such injunction if the defendants are fully able to respond in damages; and if the bill be retained for a full hearing, on the trial before the court and jury, all the facts can be fully investigated, damages for the past estimated and recovered, and a perpetual injunction be decreed for the future, if on such full hearing such decree should be found to be equitable and just.

JACKSON, Judge.

**FREDERICK W. PIKE *et al.*, plaintiffs in error, *vs.* THOMAS
D. DOTTERER, trustee, *et al.*, defendants in error.**

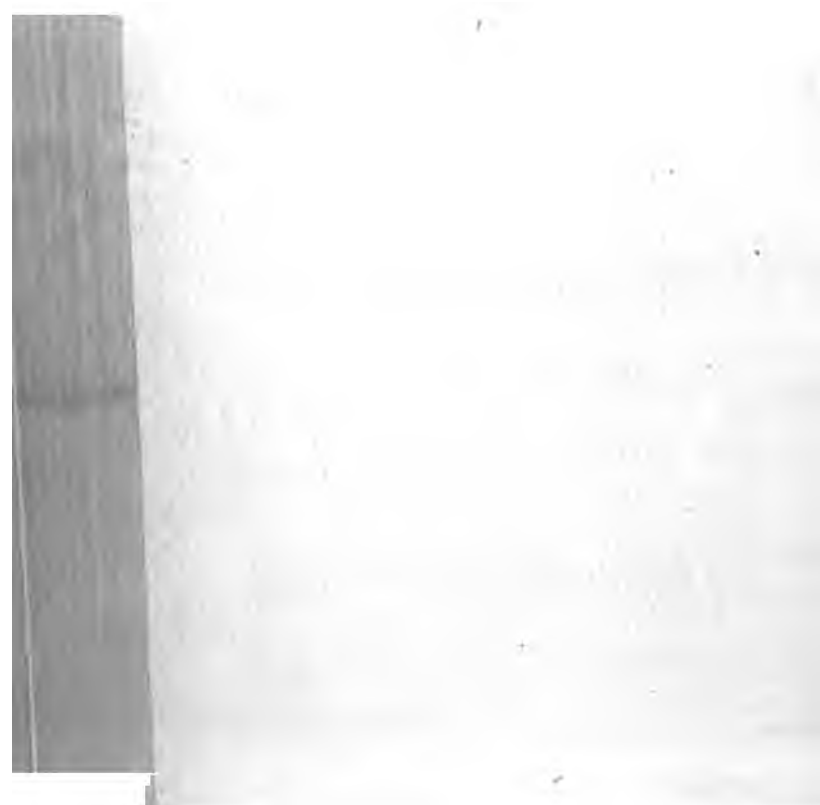
The court having expressed its opinion in its charge upon the facts of this case, a new trial is ordered.

WARNER, Chief Justice.

**S. W. MAYS, executor, *et al.*, plaintiffs in error, *vs.* T. N.
KILLEN, defendant in error.**

To authorize an executor to recover in ejectment, he must introduce the will and not the letters testamentary only: *Sorrell vs. Ham*, 9th Georgia Reports, 55.

JACKSON, Judge.



CASES ARGUED AND DETERMINED

IN THE

Supreme Court of Georgia,

AT ATLANTA.

JULY TERM, 1876.

PRESENT—HIRAM WARNER, CHIEF JUSTICE.
L. E. BLECKLEY, JUDGE.
JAMES JACKSON, “

THOMAS D. SPEER *et al.*, plaintiffs in error, *vs.* O. P. MERRYMAN & COMPANY, defendants in error.

Where a bill of exceptions is signed neither by the plaintiffs in error nor their counsel, the writ of error will be dismissed. (R.)
Nor can this defect be cured by a proposition from counsel to sign the bill of exceptions after it has reached this court. (R.)

Practice in the Supreme Court. July Term, 1876.

When this case was called, counsel for defendant moved to dismiss the writ of error because the bill of exceptions as certified by the judge and the clerk, was signed by no one. Counsel for plaintiffs in error, to cure this omission, proposed to sign either their own names or the names of the counsel who appeared in the record to have represented the case in the court.

Foster vs. The State of Georgia.

below. This the court refused to permit, and dismiss the case, enunciating the principles embraced in the above head-notes.

HAWKINS & GUERRY, for plaintiffs in error.

B. P. HOLLIS, for defendant.

JACK PORTER, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

The brief of evidence used on the motion for a new trial must have been approved by the presiding judge, notwithstanding the fact that it has been agreed upon by counsel, and this approval must affirmatively appear either in the bill of exceptions or in the record. (R.)

New trial. Practice in the Supreme Court. July Term, 1876.

Counsel for the state moved to dismissed the writ of error in this case because it nowhere appeared, either in the bill of exceptions or in the record, that the brief of evidence had been approved by the presiding judge. It was replied that though this fact was true, yet it appeared from the record that the brief of evidence had been agreed upon by counsel. The court sustained the motion and dismissed the case, enunciating the principle embraced in the above head-note.

A. L. HAWES, by D. H. POPE, for plaintiff in error.

B. B. BOWER, solicitor general, for the state.

BENJAMIN H. HILL, plaintiff in error, *vs.* **BENJAMIN T. SIBLEY**, defendant in error.

Where, to an action on a contract, the defendant seeks to recoup the damages resulting from plaintiff's failure to comply with his obligations thereunder, and the evidence is conflicting as to whether such damage resulted from the default of plaintiff, or of defendant, or of both, the jury may take into consideration the conduct of both parties and make their verdict accordingly.

Contracts. Recoupment. Damages. Before Judge RICE. Clarke Superior Court. August Term, 1875.

The facts of this case are sufficiently reported in the decision.

B. H. HILL & SON, for plaintiff in error.

S. P. THURMOND; R. N. ELY, for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiff against the defendant on an open account in the statutory form, for the sum of \$704 35, with a bill of particulars annexed. The defendant filed a plea to the plaintiff's action, in which he alleged "that the plaintiff was an overseer on the plantation of defendant for the year 1872, under a special contract to furnish sixty hands, and make for defendant plenty of corn and three hundred bales of cotton, and in consideration thereof, was to receive \$20 00 to the hand, but said plaintiff utterly neglected his duty as such overseer, and did not perform his contract, and damaged the said defendant \$5,000 00 or more, for which defendant prays judgment," etc. On the trial of the case, the jury, under the charge of the court, found a verdict for the plaintiff for the sum of \$600 00. A motion was made for a new trial on the several grounds therein set forth, which was overruled by the court, and the defendant excepted.

The plaintiff claimed that the defendant was indebted to him the sum of \$900 00 for his services as overseer for the

Hill vs. Sibley.

year 1872, together with some other items charged in his account, amounting to the sum of \$907 40, which account was credited with the sum of \$203 05, leaving due the plaintiff \$704 35, which latter sum the plaintiff claimed to be due him. The evidence in the record is conflicting as to the special contract alleged in defendant's plea, and there is evidence going to show that defendant failed to furnish cotton seed in time for planting, and also failed to furnish suitable mules in time to make the crop. The evidence is also conflicting as to the cause of the failure to make a full crop of cotton on the plantation, the defendant insisting that it was the fault of the plaintiff, as overseer, the plaintiff insisting that it was the fault of the defendant in not furnishing cotton seed in time for planting, and in not furnishing suitable mules; of bad seasons, destruction of the cotton by the caterpillar, etc. The court charged the jury, in substance, in view of the evidence in the record, that whether the contract of employment of the plaintiff was as insisted on by him, or as insisted on by defendant, in either event, if the plaintiff failed or neglected to perform his duty as an overseer, and in consequence of such failure and neglect of duty on the part of the plaintiff the defendant was damaged, the defendant is entitled to have the amount he was damaged deducted from the amount of the plaintiff's claim.

The defendant contends that inasmuch as the jury found for the plaintiff only the sum of \$600 00, the same being less than the amount claimed by the plaintiff, therefore they must have found that the plaintiff had failed to perform his duty as overseer, and as the lowest amount of damages proved by the defendant was \$5,000 00, the verdict should have been for the defendant, and the case of *Jones vs. Lynch*, 54 *Georgia Reports*, 271, is relied on to sustain the principle contended for. The case now before us is distinguishable from *Jones vs. Lynch* in two important features. This is an action on an open account, in the statutory form, with bill of particulars annexed, and it was held by this court in *Johnson vs. Quin*, 52 *Georgia Reports*, 485, that the 3393d section of the

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de was intended to allow the plaintiff to recover in an action on account such an amount thereof as he was justly and equitably entitled to, either under a special agreement to pay the amount charged or so much as the goods or services rendered were reasonably worth, without regard to the technical rules of pleading or the evidence applicable to a special contract or a *quantum meruit*. In this case, there is evidence on the part of the plaintiff going to show that it was the fault of the defendant in not furnishing mules, cotton seed, &c., that a full crop of cotton was not made, and the jury may have taken that into consideration, as well as the fault of the plaintiff, in adjusting the rights of the parties under this statutory form of action, as they had the right to do. In other words, the jury may have believed from the evidence that both parties were at fault, and regulated their verdict accordingly, on the principle of contributory negligence; there is certainly evidence in the record which would have authorized them to do so. In *Jones vs. Lynch* the action was on a promissory note, and the defendant pleaded a partial failure of consideration, on the ground that the plaintiff represented that the city lot for which the note was given was bounded by Gray street, when it was not. The court charged the jury that the measure of damages was the lessened value of the lot in consequence of Gray street not being there where it was represented to be. The lowest proven damage was \$500 00, the jury found only \$140 00 damage, and a new trial was granted because the verdict was contrary to the charge of the court. There was no conflict of evidence in that case as to the cause of the damage, as in this case. There was no evidence in that case of any contributory negligence on the part of the defendant by which the damage might have been caused, as in this case. In that case, there was no dispute or conflict of evidence as to the cause of the defendant's damage, therefore there was no margin for the jury to have apportioned the damages as there is under the evidence in this case. Whilst there is no conflict of evidence in this case as to the amount of damage the defendant sustained, there is a

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very serious conflict of evidence as to what *caused* that damage. The jury may have believed that both parties were at fault, under the evidence, as they had the right to do, and regulated their verdict accordingly. Construing the charge of the court complained of with the other portions of the charge contained in the record, there was no error, in view of the rulings of this court in *Johnson vs. Quin*, before cited, at least none of which the defendant has any legal right to complain. In our judgment, the verdict is not contrary to the weight of the evidence, and we will not disturb it. The objection to the interrogatories came too late, and is not sufficient to set aside the verdict.

Let the judgment of the court below be affirmed.

JAMES L. BROWN, administrator, plaintiff in error, vs. MELVINA M. WILSON *et al.*, defendants in error.

1. Upon a bill without equity, the judge is not obliged to order that cause be shown against granting injunction. He may refuse the injunction at once, on inspection of the bill; first hearing argument and authority from complainant, if any be offered.
2. Matters disposed of on plea or answer at law, cannot be urged, after judgment, as cause for enjoining the judgment. They are *res adjudicata*. Other parties than those then before the court were not requisite to render available the particular matters in question.
3. A contingent liability to which the estate is exposed, known to the administrator before a judgment was rendered against him at the instance of distributees, and not pleaded to the action, will not serve as the basis of an injunction to restrain the collection of the judgment, the liability being no less contingent now than it was then.
4. The time to file a bill of interpleader is before judgment for the fund has been rendered in favor of one of the claimants against the stake-holder.
5. Failure to enter a credit on the *f. fa.* will not warrant injunction to arrest levy and sale.

Practice in the Superior Court. Equity. Judgment. *Res adjudicata*. Injunction. Interpleader. Executions. Before Judge BARTLETT. Greene County. At Chambers. April 13th, 1876.

Reported in the opinion.

LEWIS & SON; JAMES L. BROWN; E. C. KINNEBREW,
for plaintiff in error.

COLUMBUS HEARD, by ORR & LEWIS, for defendants.

BLECKLEY, Judge.

1. The judge, on inspecting a bill which is clearly without equity, may decline to order the defendants to show cause, and may refuse the injunction at once: 54 *Georgia Reports*, 579. It does not follow from this that the complainant will be denied a hearing in support of his bill, if he asks for it when the bill is presented, or before the judge has returned it with his decision thereon. By brief, or otherwise, the complainant may argue his right, and the judge will hear him *ex parte*. If convinced that the defendant should be called upon to show cause, the judge will then order him up for that purpose, appointing a time and place, as the Code requires; but why should the defendant be troubled if there is obviously no merit in the bill? There seems to be no merit in this one, and we think it disposed of by the several propositions that follow.

2. If an administrator, on being cited by the distributees to appear before the ordinary to settle his accounts, in terms of the Code, files an answer, and, by way of showing cause why no absolute judgment should be rendered against him, alleges that he is under injunction from a court of equity which restrains him from paying out any money of the estate which he represents; also, that he is threatened with a suit to enforce against him, as administrator, an alleged liability which his intestate incurred as one of the securities upon a certain administration bond; and, also, that he has received notice from one of his intestate's co-securities on such administration bond, not to pay out the assets in his hands until the matter of the threatened suit shall be settled; and if, after his answer is overruled by the ordinary, the administrator ap-

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peals to the superior court, and that court, on the verdict of a jury, renders absolute judgment against him for a sum certain, in favor of the distributees, that judgment, unreversed, is conclusive upon the administrator; and the question whether the distributees are entitled to be paid the amount of the judgment, notwithstanding anything in the answer contained, is *res adjudicata*.

3. The collection of the judgment will not be enjoined on a bill setting forth the same matters alleged in said answer, together with the further averment that co-securities of the intestate upon a certain guardian's bond, (which guardian has become insolvent) have notified the administrator that the ward's estate has been wasted, and that the administrator will be held liable for the intestate's proportion of any recovery that may be had upon the bond, it not appearing that any new danger has arisen in respect to this latter element of the bill since the judgment was rendered, or that the notice mentioned was not received before, or that the administrator has come to the knowledge of any material fact since.

4. When a bill of interpleader is the proper remedy it should be brought before one of the claimants of the fund has obtained judgment therefor. If the stakeholder knows of both claims, and does not call for interpleading till after an absolute judgment goes against him, he will be too late.

5. It is no cause for enjoining a judgment that the plaintiff's attorney has failed to enter a credit on the execution according to agreement.

Judgment affirmed.

SARAH NELSON, plaintiff in error, vs. JOHN M. GILL, defendant in error.

(BLACKLEV, Judge, was providentially prevented from presiding in this case.)

In a contest between the plaintiff and defendant in *fi. fa.*, though no entry be made on the execution in seven years, yet if, during that time, the record of the court discloses that a motion was made by defendant, for re-

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relief against the judgment in the court where it was obtained, and that after argument had on said motion, the execution was ordered to proceed within the seven years, and the next year after such order for the execution to proceed, a levy was made, the judgment on which such execution issued is not dormant.

Executions. Statute of Limitations. Levy and Sale. Bere Judge CLARK. Macon Superior Court. December Term, 375.

Reported in the opinion.

THOMAS P. LOYD, by brief, for plaintiff in error.

W. A. HAWKINS, for defendant.

JACKSON, Judge.

In this case the facts were submitted to the court and were follows: No entry was made on the execution in seven years from the date thereof, but a motion was made to open and reduce it under the relief laws by one of the defendants, and returned to court by the sheriff; and then it was continued from term to term, and within seven years from the judgment the court ordered it to proceed; and the next year it was levied and met by an affidavit of illegality that it was dormant because no entry was made upon it.

If we should confine ourselves to the words of the statute, we should hold it dormant, but this court, in *2d Kelly*, and *1st Ibid.*, and many following cases, departed from the words and have given the dormant acts an equitable construction. The principle arrived at seems to be that, as between the plaintiff and defendant, any record facts which go to show that the judgment creditor was active, particularly if his want of activity during any of the time was caused by the act of the defendant, would operate to save the judgment from the operation of the act, such as claiming money in court, in the case in *3d Kelly*, and any official action upon the public dockets so as to notify the world that the plaintiff claimed that his judgment was subsisting, as in *41 Georgia Reports*, 133. We think

Jones et al. vs. Bivins et al.

this case comes within the principle ruled in those cases: 3 *Kelly*, 274; 41 *Georgia Reports*, 133; 19 *Ibid.*, 517; 25 *Ibid.*, 274; 42 *Ibid.*, 213; and that this judgment is not dormant, and we therefore affirm the judgment of the circuit court.

JOHN JONES *et al.*, plaintiffs in error, *vs.* FRANKLIN W. BIVINS *et al.*, executors, defendants in error.

(BLACKLEY, Judge, was providentially prevented from presiding in this case.)

The exceptions specified in the Code, by which a prescriptive title will be defeated, are exhaustive, and will not be enlarged by construction.

Prescription. Before Judge WRIGHT. Baker Superior Court. May Term, 1876.

Reported in the decision.

D. A. VASON, for plaintiffs in error.

WARREN & HOBBS, for defendants.

WARNER, Chief Justice.

This was an action of ejectment pending in the court below, and by agreement of the parties was submitted to the decision of the court on the following agreed statement of facts, to-wit:

"That plaintiffs have a regular chain of title for this lot from the state of Georgia; that in 1858 or 1859 the said executors sold this lot of land to A. H. Metts for \$1,000 00, one half cash, balance on credit until January, 1860, and he received a bond for titles upon the payment of the balance of the purchase money; that this note for balance of purchase money was reduced to judgment in 1861 against said Metts; that on 29th December, 1868, the executors of Walker made and filed in the clerk's office a deed for this lot to Metts, and had the same levied on and it was sold the first Tuesday in March,

89, at sheriff's sale, and purchased by them and they received deed of the sheriff therefor. It was agreed that Metts will testify that he made the purchase for James Bond. It is also agreed that John Jones purchased this lot of land from James Bond for a valuable consideration, on the second day of November, 1860, and received his warranty deed therefor; that he then went into the possession thereof, which has been open and continuous ever since, and that John Jones will testify that at the time he purchased this lot he had no notice of the bond for sales to Metts, or how James Bond derived his title to this lot, and that he was a *bona fide* purchaser without notice of this claim. It was also agreed that John Jones sued out a rule against Jackson, sheriff of said county, and Bivins and Walker, executors, at the May term, 1869, of this court, to set aside said sale, and that they filed their answer thereto which was still pending. This action of ejectment was brought on the 30th of April, 1872, against John H. Mask, who was a tenant of John Jones, who, as owner thereof, was made party defendant, November, 1872; that it was then agreed that both cases be consolidated and tried together." After argument had thereon the court decided in favor of the plaintiffs in ejectment for the premises in dispute; to which said judgment the defendant accepted.

The plaintiffs had the title to the land in controversy, and could have maintained their action of ejectment to recover the possession thereof, not only as against Metts but against Bond, and those who were in possession of the land claiming under them. It is true that they had the right to file their deed in the clerk's office, to the land, levy their execution thereon and sell it for the purchase money due therefor, but that was merely a cumulative remedy given them by statute; when they became the purchasers of the land at sheriff's sale they stood in a better condition than any other purchaser would have been.

It is admitted that Jones had been in possession of the land more than seven years before the commencement of the plaintiff's action, but it is insisted that inasmuch as Jones

The Georgia Railroad and Banking Company *vs.* Neely.

sued out a rule against the sheriff and the plaintiffs, to set aside the sale as set forth in the agreement, that that defeated his prescriptive title to the land. The statute declares that adverse possession of land, under written evidence of title, for seven years, shall give a title by prescription. The exception is, that if such written title be forged or fraudulent, and notice thereof be brought home to the claimant before or at the time of the commencement of his possession, no prescription can be based thereon: Code, section 2683. The general rule is, that when the statute commences running it continues to run, unless prevented by some one of the exceptions contained therein. According to the statement of facts in the agreement, the statute commenced running in favor of Jones, the defendant, from the 2d of November, 1860, that being the time of the commencement of his adverse possession. Inasmuch as the suing out of the rule by Jones against the sheriff and the plaintiffs, to set aside the sale as mentioned in the agreement, does not constitute one of the exceptions to the running of the statute as prescribed therein, it continued to run in favor of the defendant, and he acquires a good prescriptive title to the land in dispute, and the court erred in ruling to the contrary thereof. This case comes within the principles ruled by this court in *Wingfield, administrator, vs. Davis*, 53 *Georgia Reports*, 655; see, also, *Garrett vs. Adrian*, 44 *Georgia Reports*, 275.

Let the judgment of the court below be reversed.

THE GEORGIA RAILROAD AND BANKING COMPANY, plaintiff in error, *vs.* JAMES NEELY, defendant in error.

1. In Georgia, ordinary domestic animals and railroad trains are equally free, as respects each other, to pass over unenclosed lands. If they come in collision, with damage to either, the diligence of their respective owners will become material on the question of compensation.
2. What will excuse, and what will mitigate, where stock is killed by a locomotive.

The Georgia Railroad and Banking Company *vs.* Neely.

Full diligence, in this case, established by the company.

Negligence is matter of fact, not of law.

Does the first proposition in section 2972 of the Code apply to other than personal injuries? *Quere.*

Railroads. Fences. Damages. Before Judge POTTLE. Glethorpe Superior Court. April Term, 1876.

Neely brought case against the Georgia Railroad and Banking Company for damages resulting from the killing of mule and the disabling of a colt, both the property of the plaintiff. The defendant pleaded not guilty.

The evidence presented, in brief, the following facts:

The plaintiff, having made his crop, turned his mule out, giving first hobbled her. The mule, by grazing, would feed itself, saving the plaintiff the expense of keeping her. The mule was also turned out. Both went upon the track of the defendant at night, and were struck by a passing train. The mule was killed and the colt ruined. The engineer discovered them on the track as far ahead of his engine as the head-light would enable him to see. He immediately reversed his engine, blew on the brakes, and made every effort to stop the train, but was unsuccessful, owing to the grade upon which he was running. When he first discovered the animals on the track, some sixty to seventy-five yards ahead of him, he whistled continuously for the purpose of frightening them off. The plaintiff lived near the railroad. The engineer testified that he thought the mule would have moved from the track had she not been hobbled; that she appeared to be making great efforts to do so as the train approached her. The plaintiff, on the contrary, swore that the hobbling did not affect her powers of locomotion.

Evidence as to value, etc., was introduced.

The jury found for the plaintiff \$48 00, evidently apportioning the damages. The defendant moved for a new trial on the following, among other grounds:

1st. Because the verdict was contrary to the law and the evidence.

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2d. Because the court erred in refusing to charge as follows: "Ordinary care of horses and mules requires of the owners thereof not to turn them loose at night untended, near an unenclosed railroad track over which trains are constantly passing. The turning a mule or horse, untended, at night, hobbled or tied down so that its locomotion is seriously interfered with, into a public road adjoining an unfenced railroad track, is such gross negligence on the part of plaintiff that he cannot recover for any injury done to such horse or mule by a train running over such railroad track, where the only negligence was the absence of a fence enclosing said track."

The motion was overruled and the defendant excepted.

W. M. & M. P. REESE; S. LUMPKIN, for plaintiff in error.

WHITSON G. JOHNSON, for defendant.

BLECKLEY, Judge.

1. Georgia, for the most part, is unfenced. For purposes of mere transit, unenclosed territory is here scarcely less common to things that go upon land than are the high seas to ships and steamers. Cattle have, in this state, generally, license to range at large at the will of their owners. And, with the right of way secured, railroad trains may run along their prepared and pre-established paths, through forest as well as field. Corporations are not bound to fence their lines, nor farmers to confine their ordinary domestic animals. Nor is it incumbent upon either to prevent trains and animals from crossing each other's track. A locomotive and a mule may well pass over the same ground, so that they pass at different moments of time. If, however, they contend for the same place at the same instant, and a collision ensues, with damage to either, the diligence of their respective owners may be challenged and compared. In two respects the comparison will influence the pecuniary consequences of the collision; it will decide whether any compensation is due to the owner of the injured property, and if any, whether it should be full or only partial.

2. In advance of all testimony on the point of diligence, the law presumes that the corporation was altogether in fault: Code, section 3033. From this it results, that until evidence is brought forward which vindicates the company's diligence, it impeaches that of the other party, the company has no claim for compensation, when the property injured is the locomotive or cars; and that, when the property injured is the mule, the owner of it is entitled, *prima facie*, to compensation in full. In opposing the action to be, as in the present case, for killing a mule, the killing established and value proved, the company opens its defense with a complete case against it for full damages. To change that case into one for no damages at all, (wanting the mule to have been killed and of some value) the evidence must make out one of three propositions: that the plaintiff consented to the injury, or that he caused it by his own negligence, or that the agents of the company exercised all ordinary care and reasonable diligence: Code, sections 3033, 3034. If the plaintiff consented to the injury, the matter is plain. If his own negligence was the sole and only cause of it, there is still no difficulty; for the establishment of that affirmative, either negatives the fact of negligence on the part of the company's agents, or renders the fact immaterial. Of course, however negligent these agents may have been, if the plaintiff's negligence was the sole cause of the injury, *their* negligence was no part of the cause; hence its immateriality. If the plaintiff neither consented to, nor caused the injury, care and diligence of the company's agents must be shown to have been ordinary and reasonable. No less degree will suffice for complete exoneration. If that degree cannot be established, the plaintiff must recover something; and the question will be whether his recovery can be reduced to partial compensation only. But one thing will so reduce it; and that is proof of contributory negligence on his part. For the same reason that recovery is wholly defeated when his negligence is shown to have been the sole cause of the injury, it will be defeated in part when his negligence is shown to have been part of the cause. However slight, it

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will count against him, and though the company be chargeable with something, he, on the other hand, must lose something. For the apportionment of damages according to the relative fault of the parties, there seems to be no standard more definite than the enlightened opinion of the jury: Code, section 3034. But it should not be overlooked that the defendant is not to be deemed in fault at all, unless there was a failure to exercise ordinary care or reasonable diligence. For simply falling short of extreme and extraordinary care and diligence, the defendant is not liable even to contribute.

3. On scrutinizing the evidence before us we are of opinion that the company's agents were not wanting in ordinary care or reasonable diligence; and that the verdict which was rendered on the basis of contributory negligence cannot be upheld. The evidence is not conflicting nor inadequate. The burden of proof cast by law on the defendant, has been successfully carried.

4. The court was correct in refusing to charge, as law, propositions which affirm certain things to be negligence if established. It has been several times ruled by this court that what amounts to negligence, under all the circumstances, is a question, not of law, but of fact.

5. I have purposely omitted from the grounds of this opinion any reference to section 2972 of the Code, which declares that, "If the plaintiff, by ordinary care, could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover." It applies, in terms, to *personal* injuries, and if its meaning can be extended to injuries affecting property, it would seem to be applicable only where the plaintiff's duty is to act after the defendant's negligence has commenced and become apparent. When the consequences of a present or antecedent negligence are impending, whoever can shun them by ordinary care and fails to do so, ought not, perhaps, to be heard to complain of them, whether they touch his person or his property.

Let a new trial be granted.

Judgment reversed.

Mallory vs. The State of Georgia.

3E MALLORY, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

(BLACKLEY, Judge, was providentially prevented from presiding in this case.)

he facts that a window was closed at bed-time at night and found raised d open the next morning at sunrise, and that a trunk was found in the rden broken open, and that gold and silver locked up in the trunk were ind on the person of defendant, and that defendant voluntarily confessed at he got the money out of the house Sunday night, and took the trunk t of the house Sunday night, and had some matches and broke the trunk en, are sufficient to authorize a conviction for burglary at night.

his court will not control the discretion of the court below in refusing a w trial on the ground of newly discovered testimony, unless it be such timony as would very probably, if not certainly, change the verdict.

urglary at night is punishable in the discretion of the court, not less than e nor more than twenty years in the penitentiary, and a sentence of ten ars, where a house was robbed of a trunk at night by the thief hoisting d entering a window and breaking open the trunk and stealing money there- m, is not such "cruel, unusual and excessive punishment" as to require s court to interfere. Punishment for crime is, and ought to be, largely the discretion of the circuit courts.

riminal law. Burglary. New trial. Before Judge WRIGHT. igherty Superior Court. October Term, 1875.

Reported in the opinion.

D. H. POPE; L. P. D. WARREN; W. A. HAWKINS, for ntiff in error.

B. BOWER, solicitor general, for the state.

ACKSON, Judge.

. The defendant was indicted, and found guilty of burglary at ht, in breaking and entering a dwelling house in the city of any, with intent to steal a trunk with money therein, from house; he was found guilty, sentenced to ten years in penitentiary, and moved for a new trial on the ground t the verdict was contrary to the evidence and the law; that had discovered new evidence since the trial, and that the ishment was cruel, unusual and excessive. The court over- d the motion, and error is assigned on these three grounds.

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The facts are that a window in the room where one of the inmates of the house slept, was down at night when she retired to bed, and was found up in the morning early, and that a trunk in the room where she slept was found in the garden, broken open, and some \$8 00 or \$10 00 in gold and silver coin taken therefrom.

This money was found on the person of the defendant at Smithville, and he voluntarily confessed that he took the trunk out of the house Sunday night and broke it open, and got the money out of it. The facts that the money was found in his possession, the trunk broken open in the garden, the window raised, and his voluntary confession that he took it out, broke it open, and stole the money, are ample, we think, to justify the jury in finding the verdict of guilty.

The newly discovered evidence was to the effect that defendant was seen in the house before the family retired, and was seen coming from the garden with an axe which he threw down in the yard, and the trunk appeared to have been broken open with an axe. The theory is, that he entered the house without breaking into it, or raising the window from the outside, and then took the trunk out, or then raised the window so as to take it out; and that on this theory he was guilty of larceny from the house, and not of burglary. If the newly discovered evidence had all been in on the trial we do not think it would necessarily, or even very probably, have changed the verdict. The judge who tried the case thought that it would not, and we will not control his discretion and overrule his judgment thereon. The defendant might have been in the house looking about to see where the trunk was, and afterwards have entered through the window after raising it, and then taken the trunk therefrom; and this was undoubtedly so, if the window was down when the occupant of the room put out the light and went to bed, and if the trunk was then in the room, as the testimony shows.

3. The punishment prescribed by law for burglary in the night time is not less than five nor more than twenty years' confinement in the penitentiary, at the discretion of the court. The

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judge sentenced the defendant for ten years. We do not think this cruel, excessive or unusual. Something was said in argument about the youth of the defendant, but his age does not appear in the record; he was old enough to enter a house when everybody was asleep, and steal a trunk, with money in it, therefrom. The *quantum* of punishment within the statute is a question peculiarly within the province of the judge who tries the case, and it should not be interfered with unless very grossly abused.

Judgment affirmed.

LEWIS B. ENDRES *et al.*, plaintiffs in error, vs. EDWARD LLOYD *et al.*, defendants in error.

1. Where an execution has been levied on personalty which is subsequently seized under another execution, a court of equity will not enjoin sale under the latter, but will leave the complainants to their common law remedies, which are complete.
2. It will not be presumed that a magistrate will not administer the law correctly. If he does not, his errors may be corrected without resort to a court of equity.

Injunction. Levy and sale. Presumption. Before Judge TOMPKINS. Chatham County. At Chambers. May 2d, 1876.

On April 29th, 1876, Edward Lloyd and others filed their bill for relief and injunction against Lewis B. Endres. The allegations were as follows: On April 19th, 1876, complainants foreclosed laborers' liens against S. N. Papot & Company, before S. Elsinger, a notary public for Chatham county, and executions were placed in the hands of Julius Kaufman, a constable. On 19th April, Kaufman levied on the property of said Papot & Company, and, among other things, the contents of rooms numbers nine, ten, eleven, twelve, thirteen, fourteen, in the Pulaski House. At the time of the levy these rooms being locked and the keys in the hands of Papot

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or some unknown party, a watchman was placed before the doors of the rooms, and a locksmith sent for to open them. In the meantime, one Lewis B. Endres, a constable, acting under the process of J. J. Abrams, justice of the peace, confederating with Papot and others, undertook to levy on the same property in favor of other liens. To do this he climbed to the roof of the hotel, thence through a window into the rooms. He then bolted the doors on the inside so as to keep Kaufman out, placed a watchman within, and afterwards removed the furniture and advertised it for sale. The original affidavits under which Endres levied were null and void, not stating that the labor was performed in Chatham county. Complainants believe that new affidavits were afterwards made and new *fi. fas.* issued subsequent to April 19th, and therefore their liens were inferior to those in the hands of Kaufman.

The bill further alleges that Justice Abrams has become so interested in the conflict between the liens that he will not do justice on a trial before him, and that there is a combination between Abrams, Endres, Papot and others to defeat the *fi. fas.* issued by Elsinger. The prayer of the bill was that Endres and his confederates be made to answer the premises, that both sets of *fi. fas.* be produced in court, and the rights of all parties inquired into and determined. A further prayer was for temporary injunction against the sale of the property by Endres.

The defendants demurred and answered. The answer being immaterial here, is omitted.

The chancellor overruled the demurrer, granted the injunction, and passed an order allowing complainants to make S. N. Papot and others parties to the bill. To all of this defendants excepted.

A. P. ADAMS, by D. F. & W. R. HAMMOND, for plaintiffs in error.

R. R. RICHARDS, by brief, for defendants.

WARNER, Chief Justice.

The case made by the complainants' bill, is a contest between certain parties complainants and defendants, who are claiming laborers' liens on the property of S. N. Papot & Company, and who claim to have levied certain lien *fi. fas.* thereon. The object and prayer of the complainants' bill is to enjoin the defendants from prosecuting their lien *fi. fas.*, to the prejudice of the complainants' lien *fi. fas.*, for certain reasons alleged therein. The presiding judge granted the injunction prayed for and the defendants excepted.

Assuming the allegations in the complainants' bill to be true, the same are not sufficient to give a court of equity jurisdiction for the purpose of granting an injunction. If the lien *fi. fas.* in the hands of constable Kaufman were legally levied on the goods in rooms numbers thirteen and fourteen, prior to the levy made thereon by constable Endres, his common law remedy to obtain the possession thereof was ample and complete; nor will it be presumed that justice Abrams will not administer the law correctly, but if he does not, then his errors may be corrected in the manner pointed out by law, without resorting to a court of equity and obtaining an injunction.

Let the judgment of the court below be reversed.

WINN T. RAKESTRAW *et al.*, executors, plaintiffs in error,
vs. WILLIAM F. M. BROGDON, defendant in error.

Even though the evidence make a good case, unless it be substantially the case alleged in the bill, the complainant ought not to recover. Especially is this true where the matter of the bill not proved is libelous of the dead or wanting in nothing but malicious publication to make it so.

Where the bill alleges, among other things, that a bond for titles belonging to complainant, was, by fraud and deceit, drawn from the custody of his wife in his absence, and presented to the obligor, and that the obligor was induced by false and fraudulent representations to convey the land to the defendants' testator, the person guilty of the fraud; and where, on the

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trial, the complainant himself proves that there never was any such bond in existence, and the conveyance in question was obtained fairly and honestly, with his consent and upon his written order, there can be no verdict in his favor, whether these facts, with others proven, raised an implied trust for his benefit or not, the transaction described in the bill being essentially different from the transaction disclosed by the evidence, and the basis of trust in the one being fraud, and in the other, co-operation and mutual consent.

Equity. Pleadings. Trusts. Fraud. Before Judge RICE.
Gwinnett Superior Court. December Adjourned Term, 1875.

William F. M. Brogdon filed his bill against Gainum T. Rakestraw and Willis F. Scales, as executors of William Scales, deceased, making, in brief, the following case:

In 1848 he married Necy Jane Scales, daughter of William Scales. In 1859 he purchased from one James Reeves, lot number three hundred, in DeKalb county, for \$2,000 00. He paid \$1,600 00 in cash, gave note for the balance, and took bond for titles. Soon afterwards he assumed possession, and so remained until the year 1860, when his wife's conduct became so disagreeable that he was forced to leave her. In 1864, while still away from his wife, William Scales, finding that the bond for titles had been left in the possession of his daughter, the said Necy Jane, procured it from her by fraud; and pretending to act under authority from Brogdon, paid the remaining \$400 00 due, canceled the note, and took a deed to the property in his own name. In 1869 Necy Jane Brogdon brought libel for divorce, perfected service by publication, and obtained a divorce *a vinculo matrimonii*, without any knowledge of said Brogdon. Pending this libel for divorce, Scales made his will in which he devised a life estate in said lands to said Necy Jane, remainder in fee to her children, and on failure of these, reversion to his other heirs.

The prayer is that upon payment by Brogdon to the executors of the amount spent by Scales, they shall make title to him, or else that the land be sold and the proceeds divided *pro rata*; or else that the executors repay the amount expended by him. Discovery was waived.

endants' answer denied all the material allegations of
ll which sought to charge testator with a trust for com-
nt, and says that if he had any cause of action, it was
a monetary demand, and barred by the statute of limi-
s.

the trial, J. M. Reeves testified as follows: He had
lot number three hundred, in DeKalb county; in 1862
d the same to W. F. M. Brogdon for \$2,000 00. In
of that year Brogdon paid \$50 00, in August \$220 00,
September \$800 00. The contract was not in writing;
nd for titles was given, but receipts for the money as
l payments on the land. In October, 1865, William
paid \$938 00, part of which was for interest, and wit-
made him a deed to the property. This was not done
the presentation by Scales of an order from Brogdon
t effect, properly signed and attested. Does not know
aid the tax.

William C. Jackson testified that he had a conversation
William Scales, in which the latter stated that he had
\$300 00 or thereabouts, and taken a deed to the place.
id not state who paid the remainder.

nes M. Flowers and James Polk each testified to having
ersed with Scales during the year 1865, and that he
l that he had paid \$400 00 and taken title in his own
, but for the purpose of securing a home for Brogdon's
y. The latter further testified that Scales signified his
tion of making a deed to Necy Jane Brogdon and her
, when complainant should repay the amount expended
m.

endants' counsel admitted the marriage and divorce of
don and Necy Jane, and the death of William Scales,
arged in the bill.

he will of Scales was introduced in evidence to show the
e to Necy Jane, with remainder and reversion as set forth
s.

he jury found that complainant had paid towards the
\$1,070 00, and William Scales \$938, 00; they declared

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a trust in favor of complainant in proportion to the amount paid by him, and that the land should be sold and the proceeds divided *pro rata*.

Defendants moved for a new trial, on the following grounds, among others:

1st. Because the court erred in charging that if Brogdon paid a part of the purchase money, to that extent he is beneficially interested, nor is this changed by the fact that Reeves made title to Scales by order of Brogdon, in the absence of evidence that Scales bought and paid Brogdon for his interest.

2d. Because the court erred in charging that, in the absence of such evidence, the title made to Scales under the order of Brogdon was to be considered as made subject to his interest.

3d. Because, after the jury had returned a verdict in which no mention was made of a trust estate, the court called their attention to that fact, and caused them to retire again for the consideration thereof. On the second return the verdict included the trust.

The motion was overruled, and defendants excepted.

CLARK & PACE; T. M. PEEPLES; N. L. HUTCHINS, for plaintiffs in error.

WINN & SIMMONS, for defendant.

BLECKLEY, Judge.

1. Compare the evidence with the charges in the bill, and it will appear at a glance, that the verdict is contrary to evidence. The evidence shows that the case made by the bill is not true; the verdict finds, in effect, that it is true. If conflict can exist it is here. Should it be said that the verdict is not to be applied to the averments of the bill, but to some case outside of the bill, the answer is, that proof of a case substantially different from the one alleged, whether the case proved be good or bad, will not warrant a recovery. Relief

not be granted for matters not alleged. The court pronounces its decree *secundum allegata et probata*: 6 *Georgia reports*, 589; *Ayers vs. Daley*, 56 *Ibid.*, 119. This rule prevails in all courts. If I sue specially, in case, for stealing a promissory note and collecting money thereon from my debtor, can I recover by proving that, although I had no note and none was stolen or paid, still, I deposited a certain sum of money with the defendant, or gave him an order to collect it from my debtor, and he collected it accordingly? Is it immaterial whether I found my demand on larceny or on agency? Is theft only a species of bailment? The bill which we are considering imputes to a person dead before it was filed, conduct depraved and dishonorable in procuring title to land. It tends to blacken his memory; and if it is not belovous, it lacks only a malicious publication to stamp it with that character: Code, sections 4521, 2974.

2d. There can be no reasonable doubt that the difference between the bill and the evidence is essential. The bill makes a case of fraud which depends in no respect upon the intention of the complainant. The defendants are not put upon notice that his intention is, or can be, material to the trust sought to be established. But if the evidence embodies any trust at all, (which we do not decide, as it is *dehors* the bill,) the very life of the trust hangs on the complainant's intention at the time he gave his consent for the testator to obtain a conveyance of the land, and take it in his own name. The object or purpose of that consent is a vital question, yet, neither the consent itself nor its object is alleged. Indeed, so far from being alleged, such a consent is inconsistent with the whole tenor of the bill, and is virtually denied. And still, the complainant has proved it, and seeks to rest his recovery upon the implied purpose for which it was given. Until that consent was given, there was no seed of any trust. It was then and thereby that the trust afterwards born with the seed, if any was born, had its conception. The complainant, previously, when paying for the land so much of the purchase money as he advanced, intended to take title to himself.

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When he changed his intention and gave an order for making the deed to another person, what was his purpose? Was it a benefit to himself in the land, or was it something else? That question is not raised by the bill at all, and yet, without having it passed upon by the jury and decided, the theory that a resulting or implied trust is established by the evidence, even if otherwise well founded, cannot be upheld. Thus the great battle-field on the evidence lies wholly outside of the bill. It would be fruitless now to examine, in detail, the various errors ascribed to the court in charging and in refusing to charge the jury. Some of them are necessarily ruled by the general view which we have presented. If there shall be a verdict sustaining the bill on full proof of its averments, it may then become necessary to scrutinize further the instructions by which the jury are guided; but if some of the main facts in this record are not disproved and others established in their place, the defendants below are in no present danger.

Judgment reversed.

B. J. WILSON, plaintiff in error, vs. THE FIRST PRESBYTERIAN CHURCH OF SAVANNAH, defendant in error.

(BLECKLEY, Judge, having been of counsel, did not preside in this case.)

1. Where suit is brought in the name of a nominal party for the use of the real party in interest, the declaration may be amended by striking out the nominal party, and if a legal right remains in the usee, the action may proceed in the name of such usee.
2. A subscription signed by defendant and others in these words: "We, the undersigned, promise to pay the amount set opposite to our several names, to be applied to the completion of the house of worship of the First Presbyterian Church in Savannah, in four equal payments, on the first of July, October, and January next, and first of April, 1870; interest to run from first of July next," is a promise to pay the church, it being a corporation, and is valid, being supported by the consideration of mutual promises, and by the fact that the church, on the faith of the subscription, entered upon the work of completing the building.

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Unless so stipulated in the contract, removal or change of residence from the city where the church is located, will not bar the recovery of the money subscribed, nor will such removal operate as notice that the subscriber withdraws his subscription when he removed.

The fact that the treasurer of the church extended the time of payment of one of the subscribers, and took his note therefor (which was paid,) without interest, will not discharge the other subscribers. The contract is not joint, so that such action injured defendant.

An oral request to charge, made by counsel in the course of his argument to the jury, is not such a request as, if refused, will require the grant of a new trial.

Pleadings. Amendments. Contracts. Novation. Charge Court. New trial. Before Judge HOPKINS. Fulton Superior Court. October Term, 1875.

Reported in the opinion.

A. W. HAMMOND & SON, for plaintiff in error.

JULIUS L. BROWN, for defendant.

JACKSON, Judge.

Suit was brought by certain persons for the use of the church against the defendant for subscription to complete the church building. The nominal parties were stricken by amendment, and the action proceeded in the name of the church. The subscription was a "promise to pay the amount set opposite our several names," and is fully set out in the headnotes to this case. The defendant moved from Savannah to Atlanta, and refused to pay his subscription. Work was not actually begun when he sold his residence and left Savannah, but plans were submitted to the building committee, and specifications for the work prepared for the contractors to examine and bid on before he left. The treasurer of the church gave time for one subscriber to pay and took his note without interest, which was paid. The jury found for the plaintiff \$500 00, without interest. The defendant moved for a new trial, and the court overruled it, and the case is before us on the errors assigned.

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1. The first error is that the court should have dismissed when the amendment was made. The amendment merely struck out the nominal party, leaving the real party to go on with the case. If a right of action remains in the real party in interest, if that party could have sued in its own name at first, we cannot see why the amendment dispensing with a mere nominal party should not have been allowed. A declaration may be amended by striking out the names of one or more plaintiffs: Code, section 3486; 24 *Georgia Reports*, 516; 25 *Ibid.*, 58. If so, why not by striking out a *nominal* plaintiff.

2. The right of action was in the church. The promise, we think, was in effect made to the church, the consideration was the mutual promises, and the work done and to be done, the plans and specifications having been actually made out before defendant left Savannah, and we think the contract valid and vested in the church the right of action. A consideration may move from one and the promise be good to another: Code, sections 2744, 2747; 35 *Georgia Reports*, 258.

3. There is nothing in defendant's removal from Savannah, unless he had only agreed to pay if he remained in Savannah, of which there is no proof. Nor was his removal any evidence that he withdrew his subscription. If no expenses had been incurred before he left Savannah, his change of residence would not have discharged him; but specifications were made and bids asked for by publication before he left, which cost money.

4. Nor do we think he is discharged by the fact that the treasurer gave time to another subscriber and let him off without exacting interest. The contract was not so joint, and the several promises so dependent on each other as to relieve all the rest by indulging one, or letting one off without making him pay interest. Nor is there proof that the treasurer acted in the matter by the direction of the church so as to bind it: 20 *Georgia Reports*, 36.

5. An oral request, pending the argument to the jury, was made to the court in respect to reasonable time to begin work,

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or the defendant was released, which the court did not notice. If the counsel insisted on his request he should have put it in writing. Besides, we do not think the delay in beginning the work unreasonable, and we think the jury would have made the same verdict if the charge had been made. The verdict is amply supported by law and evidence.

Judgment affirmed.

ANDREW M. MOORE, plaintiff in error, *vs.* THOMAS D. HAWKS, defendant in error.

Where the defendant sought to show that the plaintiff was not the owner of the note sued on, but that it still belonged to the original payees, by the introduction of letters written by such payees to their agent, to whom the notes had been sent for collection, after the time of the alleged transfer, in which language was used tending to establish the position contended for, it was error to exclude two letters, a portion of the same correspondence, offered by the defendant for the purpose of rebutting and explaining those already in evidence.

Evidence. Before Judge POTTLE. Madison Superior Court. March Term, 1876.

Reported in the decision.

COBB, ERWIN & COBB, for plaintiff in error.

S. P. THURMOND, for defendant.

WARNER, Chief Justice.

The plaintiff instituted suit in a justice's court on the following paper :

"ATHENS, GA., May 22d, 1874.

"On or before the first day of November, 1874, I promise to pay W. H. Beach & Son or order, eighty-four dollars, for value received, being for 2,800 pounds of the W. & C. Superphosphate, manufactured by the New Jersey Chemical Company, sold and guaranteed by said W. H. Beach & Son, under analysis of the inspector at Savannah, to the extent of his analysis and no more.

(Signed)

"THOMAS D. HAWK, [L. s.]"

This paper, and the lien accompanying it, was assigned in blank to A. M. Moore, the plaintiff, by W. H. Beach & Son.

The defendant pleaded that the fertilizer mentioned in said paper, was fraudulently represented to be a good and valuable fertilizer, when, in fact, it was worthless and of no value as a fertilizer; that the plaintiff, Moore, was not the real owner of the paper, but that the same was the property of Beach & Son at the time of the commencement of the plaintiff's action. On the trial before the justice, judgment was rendered for the defendant. An appeal was taken therefrom to the superior court. On the trial of which the jury, under the charge of the court, found a verdict in favor of the defendant. A motion was made for a new trial on the various grounds therein stated, which was overruled by the court, and the plaintiff excepted.

The main controlling question in the case is, whether the plaintiff was the *bona fide* holder of the paper before it became due, or whether it was still the property of Beach & Son, the original payees thereof. The evidence for the plaintiff is, that he purchased the paper from Beach & Son on the 3d day of July, 1874, *bona fide*, and for a valuable consideration, and without any notice of the failure of consideration, or fraud in its procurement, and that he sent the paper, with others, to W. H. Beach & Son to collect the same for him and on his account, as his agents. In order to show that the paper sued on was still the property of Beach & Son, the defendant offered in evidence several letters written by Beach & Son to Carlton, bearing date subsequent to the date of the transfer of the paper to the plaintiff, and which had been produced by Carlton under a subpoena *duces tecum*. The plaintiff offered in evidence two letters, being part of the correspondence which was produced under the subpoena *duces tecum*, at the instance of the defendant, for the purpose of explaining and rebutting the effect of the other letters, so far as the same affected the plaintiff's title to the paper sued on. The court refused to allow the two letters thus offered to be read to the jury. In our judgment this refusal was error.

Farmer *vs.* Taylor *et al.*

If the plaintiff did become the *bona fide* indorsee and holder of the paper on the 31 day of July, 1874, then Beach & Son could not afterwards talk and write away his title to it without his consent. Inasmuch as the defendant sought to defeat the plaintiff's title to the paper by letters written by Beach & Son subsequent to the date of the transfer of the note to the plaintiff, the whole of the correspondence, including the two letters ruled out, should have been read in evidence to the jury, especially as the rejected letters recognized the plaintiff's title to the paper sued on, and bore date prior to some of the letters offered in evidence by the defendant.

All the other grounds of error specified in the bill of exceptions are overruled, and the new trial is granted solely on the ground that the court erred in ruling out the two letters offered in evidence by the plaintiff as specified in the bill of exceptions.

Let the judgment of the court below be reversed.

GEORGE W. FARMER, plaintiff in error, *vs.* LITTLETON B. TAYLOR *et al.*, defendants in error.

1. The bankrupt system of the United States acts only on the relation of debtor and creditor. It adopts the state exemption laws, in so far as they bear directly on that relation and apply to liabilities incurred before the bankruptcy; but collateral provisions in those laws, touching the relation of husband and wife, or of parent and child, are no part of the system.
2. The bankrupt's title to his exempted property is not impaired or affected by the adjudication or any of the subsequent proceedings. Land set apart to him by the assignee as exempt does not vest in his wife or family, unless the local law be complied with in respect to platting it and recording the plat in the proper office of the county. This may be done before or after the proceeding in bankruptcy; but until done, the bankrupt may convey, free from any claim by his wife or children.

Bankrupt. Homestead. Before Judge POTTLE. Taliaferro Superior Court. February Term, 1876.

Reported in the opinion.

Farmer vs. Taylor et al.

M. P. REESE; GEORGE F. BRISTOW, for plaintiff in error.

JAMES F. REID, by SIDNEY DELL, for defendants.

BLECKLEY, Judge.

In bankruptcy, a tract of eighty-five acres of land was assigned to a voluntary bankrupt, in 1868, as exempt, under the law of force at that time. The bankrupt's family then consisted of a wife and seven children under sixteen years of age, their first offspring. The wife died in 1872, and in the following year he intermarried with another. In 1874, he and the second wife conveyed the property to a third person as security for a debt; and the creditor, at the same time, executed a bond for titles, conditioned to reconvey to the bankrupt on payment of the debt. This debt being afterwards reduced to judgment, a deed from the creditor was filed and recorded, conveying his title to the bankrupt, the debtor; after which, the *fi. fa.*, founded on the judgment, was levied upon the land as the property of the latter. A claim was interposed by one of the children, then arrived at majority, in behalf of herself and of the others, still minors. On the trial of the claim, the court charged the jury that the conveyance to the creditor was void, and that the land was not subject, holding that the bankrupt and his wife had no right to sell or incumber the property, because, though laid off and assigned in bankruptcy, it was the homestead allowed to the head of a family under the state law, embodied now in section 2040 of the last Code. This section declares that certain "property of every debtor, who is the head of a family, shall be exempt from levy and sale by virtue of any process whatever under the laws of this state; nor shall any valid lien be created thereon, except in the manner hereinafter pointed out, but shall remain for the use and benefit of the family of the debtor." Among the property specified is land, to the extent of fifty acres, and five acres additional for each child under sixteen. Subsequent sections make provision for filing a schedule, surveying the land, making a plat, and having the schedule and plat recorded in the office of the ordinary. See

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tions 2047 and 2048 declare that "the debtor shall have no power to alienate or incumber the property exempt under this law; but the same may be sold by the debtor and his wife, if any, jointly, with the consent of the ordinary of the county, the proceeds to go to the use of the debtor's family. The property exempt under this law shall be for the use of the wife or widow, and at her death or intermarriage to be equally divided between the children of her former marriage then living." That part of the fourteenth section of the bankrupt act of 1867, applicable to the case, excepts from the deed of assignment such property not included in other exceptions, (irrelevant to the present question,) "as is exempted from levy and sale upon execution or other process or order of any court by the laws of the state in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount not exceeding that allowed by such state exemption laws in force in the year 1864: *Provided*, that the foregoing exception shall operate as a limitation upon the conveyance of the property of the bankrupt to his assignees; and in no case shall the property hereby excepted pass to the assignees, or the title of the bankrupt thereto be *impaired or affected* by any of the provisions of this act." It is not disputed that the provisions of the Code above recited or adverted to, are substantially the exemption laws of Georgia which were of force in the year 1864, save that section 2048, was first enacted in 1866, the same being the section which declares that "the property exempt under this law shall be for the use of the wife or widow, and at her death or intermarriage, to be equally divided between the children of her former marriage then living." But the question is, whether there passed into the bankrupt act that element of the state exemption laws which cuts down the debtor's title to exempted property, or abridges his power to incumber or dispose of it. It is very clear that the bankrupt act adopts the state law as to the fact of exemption, and as to the measure or amount thereof. Had there been no exemption in the state law, there would have been none whatever in bankruptcy,

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other than such as does not concern the present inquiry. Had the state law exempted only one acre of land, that would have been the limit in bankruptcy; and if the state law had spared to the debtor one thousand acres, the same liberal allowance would have been made to him in bankruptcy. In respect to the fact and the magnitude of exemption, the two laws, state and federal, are precisely coincident. But does the coincidence go further, and embrace local restrictions upon the debtor's estate in, and dominion over, exempted property? Clearly not.

What has been quoted above from the fourteenth section of the bankrupt act is express, that exempted property does not, under that act, pass out of the debtor, but remains in him, his title being unimpaired and unaffected. He has precisely the same title as before. He goes out of bankruptcy with the same power to sell or incumber the property that he had when he came in. He has lost nothing; and what he has gained is, the right to hold, use, and sell the property, free from all past debts from which he is or may be discharged, and free from all past liens that are not preserved by the act itself. If, before coming into bankruptcy, he had affected this property with the local restrictions incident to having it set apart and registered in the manner prescribed by the local law, it would not have been freed therefrom by having it assigned to him in bankruptcy as exempt. Or, if, after going through bankruptcy, he had subjected it to those restrictions before conveying it, they would not have been the less operative because of the bankruptcy proceedings. Exemption in bankruptcy could neither enable or disable him in the matter of diverting the property from the use of his family. It could not set the property free from their rights, nor inaugurate for them any new rights. The bankrupt act concerns itself with the debtor, not with his family. It leaves him to provide for his family as he pleases, or as he may be constrained by the local law, according to local methods. Neither directly, by its own action, nor indirectly, by setting the state law in motion, does it transfer any of his property to them.

Judgment reversed.

 Boyd & Son vs. Hall *et al.*

**VIER BOYD & SON, plaintiffs in error, vs. FRANK W. HALL
et al., defendants in error.**

(BLECKLEY, Judge, having been of counsel, did not preside in this case.)

This court will not control the discretion of the presiding judge in granting a new trial, unless the law has been violated or the discretion of the judge, on the weight of the evidence, grossly abused. Ordinarily the new trial will not work serious damage.

A *bona fide* judgment debt of a stockholder against the company in which he holds stock, may be set off by him in equity against a suit to make him individually liable in proportion to his stock.

Such judgment may be attacked for fraud, but the facts on which the charge of fraud is made must be averred in the pleadings and proven to the satisfaction of the jury on the hearing.

The creditor need not go on all the stockholders for their respective *pro rata* shares, but may recover his entire debt out of one, provided the debt does not exceed his proportion of the *entire indebtedness* of the company, the individual liability clause in the charter being as follows: "The stockholders in said company shall be liable *pro rata* for the debts of said company to the amount of the stock they respectively hold."

New trial. Stockholders. Corporations. Set-off. Judgments. Before Judge KNIGHT. Lumpkin Superior Court. April Term, 1876.

Reported in the opinion.

C. D. PHILLIPS; M. L. SMITH, for plaintiffs in error.

W. P. PRICE, for defendants.

JACKSON, Judge.

Boyd & Son obtained judgment in Lumpkin superior court, against the Yahoola River and Cane Creek Hydraulic Hose Mining Company, and levied the *fi. fa.* upon part of the company's property. Hall had also obtained judgment in the United States circuit court against the company, and levied upon all the property of the company. An injunction was granted restraining the sale by Boyd & Son; the property was sold by the United States marshal, and Hand brought it at \$5,000. Whereupon Boyd & Son filed an answer in the nature of a

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cross-bill, under our statute, to the bill of Hand and Hall, on which the injunction had been granted, alleging that Hand and Hall were stockholders at the time their debt accrued against the company; that their debt had a superior lien; that Hall and Hand had colluded to make the property bring nothing; and prayed that the sale be set aside, at least so far as concerned the portion of property levied on by the sheriff, and that this portion be sold to pay the debt of Boyd & Son, and that Hall and Hand be held individually liable to pay the debt. The defendants answered, setting up certain indebtedness of the company to Hand to a much greater amount than his share of the whole indebtedness, particularly a judgment against the company in the United States Court for \$50,000 00 or \$60,000 00, and denying all equity in complainants' cross-bill. The jury found for Boyd & Son a trifle against Hall, but some \$500 00 or \$600 00 against Hand. Hall and Hand moved for a new trial. The court granted it, and this is the error assigned.

This court has decided that it will reluctantly interfere with the grant of a new trial by the judge who tried the case, unless there has been an abuse of the discretion of the judge, or he has violated some principle of law. In this case we think the judge did not abuse his discretion, but that he should have granted the new trial. We cannot see why Hand, as a stockholder, should not be allowed to set-off his judgment against the company, if that judgment be fair and honest, against his individual liability to another creditor of the company. If his debt be honest the company is as much bound to pay him as to pay others; and individual members, including himself, are just as responsible to him as a creditor as to other creditors. The fact that he is a stockholder can make no difference. The company may owe a stockholder as well as a stranger, and individual stockholders be liable to him as to others. This court has held that a stockholder may set-off bills he has in hand of a bank against a creditor of the bank suing him on his individual liability; and if it may be done in that case why may not this stockholder set-off this judg-

ment against this company? But the jury seems not to have considered the large judgment obtained by Hand in the United States Court. This judgment, it is true, might have been attacked for fraud; but no allegation setting forth any facts going to show fraud is made in the cross-bill, and no evidence thereof, that we recall, had on the trial. Besides, the evidence is not satisfactory upon the point of the aggregate indebtedness of the company. The measure of the recovery against Hand *individually*, (and that is the only verdict and decree here except the trifle against Hall) is his proportion of the *whole indebtedness*. Without ascertaining the entire indebtedness, his share of it cannot be ascertained.

The entire stock of the company, the stockholder's share thereof and the entire indebtedness of the company are the certain figures in the proportion necessary to calculate the exact amount of the whole debt which the stockholder must pay. This is also necessary to ascertain whether the stockholder has paid already his share, or, which is the same thing, in effect, whether the company owes him enough to cover his proportion of the whole indebtedness.

What has become of the money Hand paid the marshal, and why did not Boyd & Son get their judgment paid from that fund? The evidence is not clear here. Hand swears he paid the marshal, but it does not appear what the marshal did with it all, at least it is in some doubt, and it would be well for these complainants to look into it. Perhaps they may yet get their money there. The whole case is obscure—in a fog—the verdict not satisfactorily sustained by the pleadings and evidence, and the new trial should have been granted.

To assist the counsel and court in the next trial we conclude by saying that we hold:

1st. That Boyd & Son may recover their entire debt out of any stockholder, provided their debt does not exceed his proportion of all the debts: 16 *Georgia*, 227; 42 *Ibid.*, 582.

2d. But if a stockholder has already paid his proportion of all the debts, or if the company *bona fide* owe him that proportion, it cannot be recovered from him again.

Godwin *et al.* vs. Crowell.

3d. The *bona fides* of the stockholder's debt, whether in judgment or otherwise, may be attacked, and if found fraudulent, may be set aside and not considered either in the estimate of the whole debts of the company or in setting it off against his individual liability; but it must be attacked distinctly by allegations of facts in the pleadings and these facts must be proven on the hearing.

In the light of the foregoing principles we cannot see why the case may not be so tried as to do justice to all parties.

Judgment affirmed.

W. C. GODWIN *et al.*, plaintiffs in error, vs. E. W. CROWELL, agent, defendant in error.

(BLECKLEY, Judge, was providentially prevented from presiding in this case.)

Where the agent of an insurance company, who had collected money belonging to his principal, for which he failed to account, in order to prevent a criminal prosecution for such breach of trust, gave his promissory note, with security therefor, the note cannot be collected. *Aliter*, if given for the purpose of securing the debt to the principal, and not with a view to setting the criminal prosecution.

Contracts. Consideration. Before Judge CLARK. Sumter Superior Court. October Adjourned Term, 1875.

Reported in the decision.

C. F. CRISP; B. P. HOLLIS; ALLEN FORT, for plaintiffs in error.

GUERRY & SON, for defendant.

WARNER, Chief Justice.

The plaintiff brought his action against the defendants on a promissory note for \$334 80. The defendants pleaded that the note was given to settle and prevent a criminal prosecution.

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ist Godwin, who was the principal maker of the trial of the case, the jury, under the charge of found a verdict in favor of the plaintiff. The deade a motion for a new trial on the several grounds forth, which was overruled by the court, and de-cepted.

ars from the evidence in the record, that Godwin gent of the Imperial Fire Insurance Company, at of which the plaintiff is now the resident manager; d, as such agent, collected the amount for which the given for said company in the way of premiums; e winter of 1871 the plaintiff demanded of him, by sum of money so due, and that he failed to pay it, ooks of the plaintiff were taken out of his hands. s before the note was given, Hancock, the agent of iff, told Godwin that he would give him a short y what he owed the company, or give him a note, security, for the payment thereof, and if he failed he, the agent, would prosecute him on the criminal e court; that if he paid said money, or gave said omy company would not prosecute him; that his inten-izing said note was to keep from being prosecuted, s not prosecuted after giving the note. The amount e is the same amount demanded of him by the

The court charged the jury, amongst other things, that the agent of the company threatened Godwin minal prosecution does not discharge the defendant, or his securities, provided Godwin owed the com-amount of the note. If the consideration of the he compromising or settling a criminal prosecution, vin did not owe the debt, the plaintiff cannot ret if he did owe the debt, and this note was given to payment, he is entitled to recover, whether he was l with a criminal prosecution or not, or whether he settle the prosecution or not." This charge of the view of the evidence in the record, was error. The for the jury to decide was whether the note was

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given for what Godwin owed the company, or whether it was given to settle the criminal prosecution with which he was threatened under the penal laws of the state: Code, sections 3054, 3055. If the note was given for what Godwin owed the company, then the plaintiff was entitled to recover. If the note was given to suppress a criminal prosecution amounting to a felony under the penal laws of the state, then the plaintiff was not entitled to recover, and the court should have so charged the jury. The charge, as given, was calculated to confuse and mislead the jury as to the real issue involved on the trial of the case.

Let the judgment of the court below be reversed.

LAW & COMPANY, plaintiffs in error, *vs.* A. J. McBRIDE, defendant in error.

1. The issue being one of pure fact, unaffected by any question of law, and the evidence being conflicting and not insufficient, the verdict must stand.
2. Where the disputed question is, who purchased the assets of a firm and agreed to pay its debts, a writing, signed by the defendants, showing that they claimed some of the assets and took an interest in paying or securing a note given by one of themselves in compromise of one of the debts, is relevant testimony against them.

New trial. Evidence. Before Judge PEEPLES. Fulton Superior Court. October Term, 1875.

Reported in the opinion.

FRY & KING, for plaintiffs in error.

B. H. HILL & SON; T. P. WESTMORELAND, for defendant.

BLECKLEY, Judge.

1. Firm assets were sold, the purchaser agreeing to pay all the firm debts, and to protect the present plaintiff, one of the partners, against them. The plaintiff was afterwards com-

elled by law to pay a portion of them ; and he, thereupon, brought this suit against the defendants for his reimbursement. The disputed question was, who was the purchaser, whether the firm now sued, or an individual member of the plaintiff's firm, the same that made sale of the assets. The evidence was in bristling conflict, and the case turned wholly on the credibility of the principal witnesses, and on the degree of corroboration afforded by certain writings, which were not, themselves, decisive of the controversy, either way. The issue was one of pure fact ; and the jury have decided it, not without sufficient evidence to support their finding. To break their verdict would be to break the law.

2. A writing was admitted in evidence, for the plaintiff, showing that the defendants claimed title to, and exercised control over, some of the assets, by assigning them to him in order that he might realize upon them and use the proceeds in paying off, in case the defendants themselves should fail to pay off, an individual note given by one of the defendants to a creditor of the plaintiff's firm in compromise. This writing was signed by the defendants, and certainly showed dealings between them and the plaintiff, touching some of the assets that had been sold by the plaintiff's firm ; and it, moreover, connected the defendants with measures taken to satisfy a debt of that firm. There was no doubt that somebody had purchased the assets, and that the purchaser had agreed to pay the debts. The whole difficulty was in identifying the purchaser. Here were some of the assets, and here was one of the debts. The defendants, by this writing, concerned themselves with both ; and hence, the writing was relevant testimony. It was properly admitted for what it was worth.

Judgment affirmed.

Heard *vs.* Arnold & DuBose.

M. FANNIE HEARD, plaintiff in error, *vs.* ARNOLD & DuBOSE, defendant in error.

The claim of a creditor is barred by a discharge of the debtor in bankruptcy, although his name was not placed in the schedule, nor any notice given to him personally or by mail, the notice by publication in two newspapers having been given according to the bankrupt law.

Debtor and Creditor. Bankrupt. Notice. Before Judge POTTLE. Wilkes Superior Court. May Term, 1876.

Reported in the opinion.

W. M. SIMS; S. H. HARDEMAN, for plaintiff in error.

ROBERT TOOMBS; D. M. DuBOSE; F. H. COLLEY, for defendant.

JACKSON, Judge.

The defendants pleaded their discharge in bankruptcy to the plaintiff's action on a claim provable in the bankrupt court. Due notice was given by publication in two newspapers, but none served personally, or by mail, upon this plaintiff, nor was her name in the schedule of creditors. We think that the bankrupt law requires notice by publication to meet those cases where the creditors' names are not in the schedule, or furnished to the marshal, and in the absence of fraud in omitting the plaintiff's name as creditor in the schedule, the discharge operates to bar her right to recover. Three kinds of notices are provided for in the act. First, newspaper notices; second, notice personally or by mail to all creditors upon the schedule, or whose names may be given the marshal by the debtor in addition; and, third, such personal or other service, to any persons concerned as the warrant specifies: Bump, section 5019, page 384, 8th edition. The debtor should give the names of all the creditors in the schedule, but he may omit for some reason or another, somebody; then he may, if he remembers in time, give such name to the marshal afterwards, and he is bound to notify such person though not in

the schedule, but he may omit some creditor after all; his negotiable paper may be in somebody's hands whom he does not know, or he may have forgotten some creditor; to meet such cases as these, the law requires the notice by publication, and in the absence of fraud, (and none is pretended here,) the discharge will operate as a bar as completely in the latter, as in the former case, and such is the decision of the court of appeals of Kentucky: 13th N. B. R. Reports, 157; of the supreme court of New York: 13th N. B. R. Reports, 14; of the supreme court of Maine: 6th N. B. R. Reports, 377; of the supreme court of Rhode Island: 12th N. B. R. Reports, 143; and many cases cited by Bump, 8th edition, page, 730. That author lays down the principle on that page, 730, thus: "If the notice required by the statute has been duly published, the discharge will bar the debt, although the name of the creditor was not placed on the schedule nor any notice given to him." And if such were not the law it would be difficult to make a bankrupt law which would relieve debtors in many cases. Our homestead exemptions, and citations to issue letters of administration, etc., and to discharge administrators, etc., by letters of dismission, are all instances of notice or service by publication, and always held binding on all interested when duly published.

Let the judgment be affirmed.

WILLIS A. HAWKINS, plaintiff in error, *vs.* **JONAS SMITH**, trustee, defendant in error.

(BLECKLEY, Judge, was providentially prevented from presiding in this case.)

- The judgment relied upon to sustain the plea of *res adjudicata*, manifestly did not cover the matter in controversy, and therefore the charge of the court, based upon this view of the case, was not error.
- However honest an attorney may be, in the belief that money collected belonged to him, yet if, in fact, such fund was the property of his client, this honest belief is not such "good cause" as will relieve him from the payment of twenty per cent. per annum from the time of demand therefor.
- A question not made in the court below will not be passed on here.

Hawkins vs. Smith.

Judgments. Charge of Court. Attorney and client. Practice in the Supreme Court. Before Judge CLARK. Sumter Superior Court. October Adjourned Term, 1875.

Reported in the decision.

B. P. HOLLIS; ALLEN FORT; N. A. SMITH, for plaintiff
in error

GUERRY & SON, for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiff against the defendant, as an attorney at law, to recover a sum of money alleged to have been collected by him, and which he refused to pay to the plaintiff when demanded. The defendant pleaded that the plaintiff ought not to maintain his action against him because the whole matter had been settled and determined by a judgment of the superior court of Sumter county upon a rule *nisi* embracing the same subject matter. On the trial of the case, the jury, under the charge of the court, found a verdict in favor of the plaintiff for \$200 00, with interest at seven per cent., from the 5th of April, 1869, up to the 15th of April, 1874, and twenty per cent. thereon after demand of payment.

It appears from the evidence in the record that the defendant collected, on a mortgage placed in his hands for collection, the sum of \$900 00 at one time for one portion of property embraced in the mortgage, and that he received at another time \$200 00 from Elam for another portion of the property embraced in the mortgage. The controversy between the parties in this suit was in relation to the \$200 00 received from Elam. When the defendant was ruled for the money which he had collected the original rule appears to have been amended so as to include the money received by the defendant from Elam. The defendant, in his answer to the amended rule, admitted the receipt of \$900 00 for the mortgaged property sold to Joiner,

Hawkins *vs.* Smith.

for the plaintiff, but insisted that he received the money from Elam in his own right and not as the attorney of any person.

There appears to have been a rule absolute granted against the defendant for the sum of \$900 00, about which there was no controversy at the trial of this case. The plaintiff demurred to the defendant's amended answer, which was overruled, the court holding it to be sufficient to protect the defendant from the payment of the money alleged to have been received by him from Elam; then the following agreement appears to have been executed, which was offered and read in evidence by the plaintiff:

J. Smith, trustee, vs. B. F. Marshall. Rule against W. A. Hawkins, attorney at law.

"The rule in the above stated case having been dismissed by the court without being traversed, and their being no further proceedings had in said rule case, I hereby waive all advantages (if any) which have arisen or may arise in favor of myself by reason of the said proceedings, as against any suit at law which may be hereafter instituted upon the same cause of action in Sumter superior court, but will insist that I am not liable, originally, to any greater extent than was adjudged by said proceedings.

(Signed)

"W. A. HAWKINS."

"The plaintiff offered in evidence the mortgage and the receipt of the defendant to Elam for \$200 00, which was signed by him as attorney. The plaintiff introduced the defendant as a witness, who stated, amongst other things, "that until his memory was refreshed by looking at the transfers and receipt, he thought that he had sold the whole interest to Joiner, and that he received the \$200 00 from Elam as his own individual money and not as the money of the plaintiff." The defendant introduced in evidence the rule *nisi*, answer, and judgment of the court making the rule absolute against him for \$900 00, which it was agreed he had paid. Smith testified that he *considered* the rule on which the order was passed a new rule, and not an amendment.

In rebuttal, the plaintiff proved by Guerry that the rule on which the judgment was passed was an amendment of the first rule, and not a new rule. The defendant, in his second answer, recognizes the rule as an amended rule, when he says,

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"In answer to the rule as amended, respondent says," etc. The plaintiff also proved a demand upon the defendant, in writing, to pay the money collected by him to his attorney, or in default thereof that twenty per cent. per annum would be required.

The defendant requested the court to charge the jury, "If defendant, in good faith, refused to pay the money on demand of the plaintiff, believing that he was not liable for the amount, or any part thereof, the jury may find only lawful interest, and are not compelled to find twenty per cent., from the time of the demand, on the \$200 00;" which charge the court refused to give, but did charge the jury as follows: "So far as the claim for the corner lot, known as the Handy lot, was concerned, the judgment on the rule against Colonel Hawkins was a bar to any further proceeding on that account. The plaintiff having obtained a rule absolute against Colonel Hawkins on that claim, could not recover for the same demand in an action at law. If the Elam lot was not a subject matter of the rule, then the rule absolute, as to the money collected on account of that lot, could not be pleaded in bar of this action. If Colonel Hawkins received \$200 00 on the Elam lot, he is responsible for that amount, with legal interest up to the notice, and twenty per cent. after the notice." To the refusal to charge as requested, and to the charge as given, the defendant excepted, and assigns the same as error.

1. In our judgment there was no error in the charge as given, or in the refusal to charge as requested, in view of the evidence contained in the record. From an inspection of the record and proceedings had as to the rule absolute for the \$900, it is quite clear, we think, that the \$200 00 received from Elam, which is the subject matter of the present suit, was not included in that judgment. The record shows that the original rule was amended so as to require the defendant to show cause why he should not pay to the plaintiff the money received from Elam. The defendant answered the rule *as amended*, admitted the receipt of the \$200 00 from Elam, but stated "that he received the same

in his own right and not as the attorney of anybody." This amended answer of the defendant was not traversed, and upon that amended answer the court held he was not liable to be ruled as an attorney at law of the plaintiff for the \$200 00 received from Elam; the plaintiff did not traverse the defendant's answer as to the \$200 00 received from Elam, having already taken a rule absolute against him for the \$900 00 received from Joiner, and it is therefore, in view of these facts, that the defendant's written agreement hereinbefore set forth becomes conspicuously significant as to the merits of the present suit for the \$200 00 received from Elam. It is true that in that agreement the defendant reserved the right to insist in this suit that he was not originally liable to any greater extent than \$900 00, the amount for which the rule absolute had been granted against him for the money collected from Joiner. The question that remained to be tried in the present suit, was whether the defendant was originally liable to the plaintiff for money received on the mortgage to any greater extent than the \$900 00 received from Joiner, and for which the rule absolute had been granted. The jury, under the evidence, have found by their verdict that the defendant was originally liable to the plaintiff to a greater extent than \$900 00, to-wit: the \$200 00 received from Elam, and that this latter amount was not included in the judgment for \$900 00.

2. The demand for the money in the hands of the defendant was made in pursuance of the provisions of the 3950th section of the Code, which makes an attorney at law liable to pay at the rate of twenty per cent. per annum for money in his hands, collected by him for his clients, from the date of the demand, "unless good cause be shown to the contrary." The request to charge was not in the language of the Code. The request was: "If the defendant, in good faith, refused to pay the money on demand of the plaintiff, believing that he was not liable for the amount or any part thereof, the jury may find only lawful interest, and are not compelled to find twenty per cent. from the time of the demand on the \$200 00." The

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statute is imperative and declares that the attorney at law *shall* be compelled to pay at the rate of twenty per cent. per annum from the date of the demand, unless good cause be shown to the contrary. What is the good cause attempted to be shown in this case? It is true that Colonel Hawkins, the plaintiff's attorney, states that until his memory was refreshed by looking at the transfer of the property and his own receipt for the money, that he thought that the \$200 00 received by him from Elam, was his own individual money, and not the money of the plaintiff, his client. However honest Colonel Hawkins may have been in his opinion, and we are bound to take his statement as true, still, that was not, in our judgment, such good cause as is contemplated by the statute which will protect him from the payment of the twenty per cent. to the plaintiff. It will not do to hold that when an attorney at law collects money for his client, and that money is demanded of him under the statute, and he refuses to pay it, that he can protect himself when ruled or sued for the money, from paying the twenty per cent. thereon as the statute prescribes, because, in his opinion, or in his thoughts, the money was his individual money, and not the money of his client, however honest his opinion or thoughts may have been.

3. In relation to the point suggested on the argument here that the plaintiff in the mortgage was only entitled to the principal sum due on the mortgage, and could only collect that amount from his attorney, although he may have collected a larger amount, the certificate of the presiding judge to the bill of exceptions states that no such point was made as to the title of the plaintiff at the trial in the court below; and, as a matter of course, no such question was decided there which this court can review. There was no motion for a new trial in this case; no complaint that the verdict was contrary to the evidence or without evidence to support it; and if there had been, the result would have been all the same.

On the statement of facts contained in the record, let the judgment of the court below be affirmed.

JULIA A. MORRIS, plaintiff in error, *vs.* **GILBERT TENNENT**,
defendant in error.

When exempted personalty has been exchanged, whether legally or not, for property of like kind, the latter stands, as against the husband's creditors, in the place of the former, so long as the exchange is not repudiated by any of the parties in interest. The family are entitled to retain the substituted property, either for enjoyment or for restoration to the true owner.

Homestead. Levy and sale. Claim. Before Judge
KNIGHT. Cobb Superior Court. November Term, 1875.

Reported in the opinion.

GEORGE N. LESTER; **GARTRELL & DUNWOODY**, for plain-
tiff in error.

W. T. & W. J. WINN, for defendant.

BLECKLEY, Judge.

Under the homestead and exemption laws, certain personalty was set apart as exempt, by approval of the ordinary, in 1869. Afterwards, one of the horses included in the schedule was exchanged by the head of the family for another horse, and this latter was exchanged for a third. The first exchange was not approved by the ordinary; the second probably was. In 1875, an execution from a justice court, issued in 1874, against the head of the family, was levied upon the third horse. A claim was interposed by the wife, (on her own behalf, and of her children) founded on the homestead or exemption right. The justice of the peace held that the property was not subject. On *certiorari* the superior court held that it was subject.

When exempted property has been exchanged (whether legally or not) for other property of like kind, the latter stands in place of the former, so long as the transaction is not repudiated by any of the parties in interest. A creditor who is not injured thereby, cannot complain. If any of his debtor's effects not exempt have gone into the new property, he can,

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by a proper proceeding, subject it to that extent; but if the new property, as in the present case, has been wholly paid for by the old, the right of the family is superior to the right of a creditor, until the consideration has been restored. By the act of 1876, pamphlet, page, 51, passed since this case was decided in the court below, the proceeds of homestead property are treated as chargeable to the family when the benefit thereof has been enjoyed by the family. There is a strong backbone of equity in that principle; and, as a consequence, there is much reason for allowing the family to hold on to the proceeds, either for enjoyment, or for restoration to the true owners in case the family should reclaim the homestead property because sold illegally.

Judgment reversed.

ALEXANDER CHAPPELL, plaintiff in error, vs. URIAH BOYD et al., defendants in error.

1. In attesting an affidavit to a bill in equity, a notary public need not affix his seal. It is not such a notarial act, under section 1502 of the Code, as requires a seal for its authentication.
2. Process bearing attest in the name of the Honorable James M. Clark, of said court, leaving out the word "judge," is good, especially if no exception be taken to it until after judgment.
3. Where the bill alleges that vendor of lands, who gave bond to make titles to vendee on payment of purchase money, has only received half the purchase money, and is sued for that half, because it was not the money of the vendee but that of his wife, and that he has sued to judgment the other half of the purchase money, and levied the execution based thereon upon the land, having first made a deed thereto solely for the purpose of selling the land to make his money under the statute, Code, 3586, when he was met by a claim of the wife to the land, on the ground that her money paid for half of it, and that was all it was worth, and that this claim case, after delays from time to time, was decided against the wife by the jury and court below and the court on appeal, and on again re-advertising for sale he was met by another claim, wholly frivolous and intended for delay only, by the brother of the wife, holding a pretended title under deeds from the husband and wife, made after the decision of the first claim case, for an inadequate price in the form of a promissory note, payable in 1878, with possession retained by

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band and wife without rent, and that this latter claim, like the former, is *in forma pauperis*, and that the parties are all insolvent, and that the land is constantly deteriorating in value so as now not to be worth the remainder of the purchase money with interest, and that the husband and wife and brother have colluded to delay the complainant and keep the land in litigation interminably, with a view to enjoying the rents and profits thereof until the same is worn out, and that the defendant in *fi. fa.* has only boasted that he would do so without paying another dollar, and are all the circumstances of the case, and accompanying papers and depositions, show the truth of the case made by the bill and the frivolity of pretended claim, and the prayer is for an injunction to restrain the defendant in execution and his wife from procuring any other persons to put such claims, and further delaying the complainant, and for the appointment of a receiver to take possession of the land and hold the same until pending claim by the brother is tried :

that there is equity in the bill, and that the injunction should be granted the receiver appointed ; but as the claim by the wife was not decided, the application for a receiver was not made until the growing crop was reaped, that the receiver be instructed to allow defendants a reasonable time to gather the present crop, and the use of the tenements and premises for that purpose until that is done.

Notary public. Seal. Attestation. Process. Judgments. For and purchaser. Injunction. Receiver. Before Judge BRADLEY. Webster County. At Chambers. June 17th, 1876.

Reported in the opinion.

JERRY & SON, for plaintiff in error.

JOHN R. WORRILL, for defendants.

BRADLEY, Judge.

Chappell sold Boyd a tract of land in 1872 for \$1,200 00, and gave Boyd bond for titles to be made when the purchase money was paid. Boyd gave two notes for the land, each for \$500— one payable in November, 1872, and the other in November, 1873. The first was paid ; the second is not yet paid.

Chappell sued on the second, got judgment, made deed for the land, under the statute, and levied upon it. Mrs. Boyd redeemed the land on the ground that Boyd used her money, to the knowledge of Chappell, to make the first payment.

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The jury found it subject; she moved for a new trial and brought the case here because the court overruled the motion. This court affirmed the judgment at the last term. Mrs. Boyd then surrendered her right and title to her brother, Sims, and Boyd made Sims a title, and Sims has put in his claim to the land. Mrs. Boyd claimed *in forma pauperis*, and so did Sims. The last note has been due three years; a claim involving, necessarily, the same title now set up by Sims, has been decided by the jury and the superior court, and this court, against that title, and this claim is put in by the brother on deeds made by the defendant *in fi. fa.* and wife, since the final trial of the case by this court. The land has deteriorated in value, and is becoming less valuable year by year, until it will not bring the balance of the purchase money and the interest. The deed to Sims was made on the day he claimed the land and was in the shape of a receipt of a note due in 1878, for \$500, with right of possession reserved to Boyd, without rent, and on the same day Mrs. Boyd surrendered her title to Sims; her title being a deed made to her by her husband in 1873, in consideration that her money had paid the first \$600 00. Boyd has been in possession four years, and the rental is worth from \$100 00 to \$150 00 per annum, and has boasted that he would keep the land until worn out without paying another dollar. Mrs. Boyd has sued Chappell for the \$600 00 which Boyd first paid him; so that Chappell's land is gone at half the price agreed upon, and he is sued for the half he has received. A bill alleging these facts, and charging collusion between wife, husband, and wife's brother, to protract litigation, by claims purely frivolous, with no security for damages for delay, and praying injunction against threatened waste of crops, and against further frivolous claims, and the appointment of a receiver to take charge of the land and crops, rents, etc., until the claim case is tried, was brought by Chappell against Boyd and wife, and Sims. The answer denied the insolvency of Sims, and the demurrer to the bill is that there is no equity in it, and it is not sworn to, because the notary does not affix his seal to the affidavit, and that the process to

the suit on which Chappell's judgment is founded leaves out the word "judge," bearing test in the name of the Honorable James M. Clark of said court. The chancellor refused the injunction, sustaining the demurrer and dismissing the bill; the complainant excepted, and the case is before us.

1. The first question is, was the bill sworn to? Is it necessary that a notary should annex his notarial seal to his attestation of an affidavit? We do not think that the act of administering an oath is such a notarial act as in the sense of the statute, Code, section 1503, requires a seal. The statute means acts connected with his commercial duties, such as noting and protesting bankable paper, etc. Besides, the court ought not to dismiss a bill or refuse an injunction on such a ground. Time should be given to perfect the affidavit or attestation, or to swear again to the bill.

2. Nor do we think that there is anything in the second point that the process does not bear test in the name of the *judge* of the superior court. It is true the word "*judge*" is omitted by mistake or carelessness, but the Honorable James M. Clark, of said court, is the judge thereof. Certainly it is too late after judgment to take such an exception to the process.

3. But the main question is, ought a court of equity to stop this litigation, threatened to be continued until the land is worn out without paying another cent for it, and to appoint a receiver to hold the estate for the party in interest? The claim is evidently frivolous. The merits of the case were passed upon on the claim case of Mrs. Boyd, and this claim of her brother is a mere renewal of her claim. The manner in which it has been fixed up has not even the merit of ingenuity. It is so thin anybody can see through the veil that would hide it. The cat is not even under meal enough to hide her. The whole body of the ostrich is visible, though his head be in the sand; if he does not see his exposure, everybody else who looks can. The present claimant, the brother of the former one, and brother-in-law of defendant, takes title, agreeing to give \$500 00 for the land in 1878, the de-

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fendant and former claimant, husband and wife, to remain in possession without rent until that time. This deed is made to him after the claim is decided against his sister, of which he has full knowledge, being a witness in the case. He buys a title knowing it to be worthless, gives nothing for it, but a promise to pay \$500 00 in the distant future, and leaves possession in the defendant. He is evidently acting for the former claimant and the defendant in *fi. fa.* It is a plain case of collusion between the three. Inasmuch, therefore, as the complainant holds the title to this land, or has parted with it by making it to the defendant in *fi. fa.*, for the sole purpose of selling it by the sheriff to make his money, we think that equity should intervene by injunction to restrain these defendants from putting in any additional claim to this land, or procuring others to claim it for them, or either of them, and that a receiver should be appointed to take charge of it until the present claim case be tried. But inasmuch as the defendant in *fi. fa.* and wife had planted their crops and fixed for the year before the final decision of her claim and the application for a receiver, and the interference by a receiver would work hardship upon the agricultural interest of the state if allowed absolute dominion pending the making of the crop, and upon the principle that he that sows in peace shall reap in peace, that tenant for life is always entitled to emblements, because it was not known when he sowed that the life would end before he reaped, and that tenant for years, if the end of his estate was uncertain, was also entitled to reap what he had sown: 2 Blackstone, 95, 116; and that even a tenant at will cannot be dispossessed after planting his crop until he has gathered his emblements: Code, section 2292; we think, that the receiver should allow the defendants, Boyd and wife, a reasonable time to collect their crop of the present year, but take full possession in time for preparation for another year, and hold the place and work the same, holding the proceeds until this claim is tried. This case, we think, turns a good deal upon facts similar to those in the case of *Tufts vs. Little*, 56 Georgia

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sports, 139. At all events, it is a clear case of gross fraud and collusion, and an effort to defeat justice by keeping up litigation after the merits of the controversy have been passed on by the courts, and where the party complainant is kept out of his land, the title to which he retained as his security, a second payment for it refused and resisted, and suit brought against him and now pending for the first payment. He is kept out of his land and its price, too; he ought to have one or the other.

Let the judgment be reversed, and the chancellor proceed indicated in this opinion.

WILLIAM A. ASH, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

That an indictment for assault with intent to murder with a pocket-knife did not allege the use made of such weapon, is not good in arrest of judgment.

The fact that a juror said, before the trial, that "he wanted the defendant's case to come before him, that he would remember or recollect him," is not good ground to set aside a verdict where he swears to his impartiality. Newly discovered evidence, which would not probably have produced a different result had it been admitted, is no ground for a new trial.

Where, upon a trial for the offense of assault with intent to murder, the court, at the request of defendant's counsel, charges that certain acts on the part of the person assaulted would have reduced the offense, had death ensued, from murder to voluntary manslaughter, it was not error to add the following: "In all cases of voluntary manslaughter, there must be some actual assault upon the person killing, or attempt by the person killed to commit a serious personal injury on the person killing."

Criminal law. Indictment. Assault with intent to murder. New trial. Charge of Court. Before Judge KNIGHT. Impkin Superior Court. April Term, 1876.

The following report, taken in connection with the decision, will sufficiently explain the facts of this case:

At the request of defendant's counsel, the court charged the jury, in substance, as follows: "If you are satisfied, from the

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evidence, that in a quarrel between the prosecutor's wife and prisoner, she made threats of serious personal injury to him; that shortly afterwards, prosecutor, in company with one Jack Ash, went in the night time to Turner's mill, where prisoner was employed in attending to his usual business; that they approached him, one on each side, and when he asked them if anything was the matter, refused to answer but came toward him; that a quarrel ensued and prisoner, honestly acting under fears of great personal injury, struck the blow in order to save his own life or prevent great bodily harm, then these are other 'equivalent circumstances,' and it would not have been murder, but only voluntary manslaughter, if prosecutor had been killed."

To this the court added the charge set out out in the fourth head-note, and this was made one of the grounds of the motion for a new trial.

H. P. BELL; W. P. PRICE; B. A. MARTIN; J. N. DORSEY, for plaintiff in error.

C. D. PHILLIPS, solicitor general, for the state.

WARNER, Chief Justice.

The defendant was indicted for the offense of an "assault with intent to murder," and on the trial therefor was found guilty. A motion was made in arrest of judgment, and for a new trial, on the several grounds therein set forth. Both motions were overruled by the court, and the defendant excepted.

1. An assault with intent to murder may be committed by using any weapon likely to produce death. The allegation in the indictment is "that the defendant, on the 9th day of February, 1876, then and there, unlawfully, and with force and arms, in the county aforesaid, using, then and there, a pocket knife, said knife being a weapon likely to produce death, upon one Francis S. Ash, in the peace of said state, then and there being, did make an assault with the intent

aid Francis S. Ash, then and there to kill and murder, and with malice aforethought, contrary to of the state," etc. The objection is that it is not specified what use the defendant made of the knife: this objection would have been good on special defense pleading on arraignment, it is not necessary

But, in our judgment, the objection comes too late, and it is not good in arrest of judgment, under provisions of the 4629th section of the Code, and the con- given to that section by this court.

There was no error in overruling the motion in arrest of judgment. The evidence as to the incompetency of the juror, is not sufficient to set aside a verdict which could have been otherwise than it was under the evidence. That the juror said before the term of the court, "I wanted the defendant's case to come before him, that I might remember, or recollect him," did not affirmatively prove that he was not an impartial juror when he had sworn to be so.

There was no error in overruling the ground as to the covered evidence in relation to the knife being found in the defendant's pocket. The prosecutor swore that he had the knife in his pocket at the time of the difficulty. After it had been cut by the defendant, and had fainted and fallen to Turner's house, there was a knife found in his pocket. When or how it got there does not appear; it was not the prosecutor's knife. Such evidence as that, if admitted on the trial, would not even probably have produced a different result.

There was no error in the charge of the court, in view of the evidence, after giving the charge as requested by the defendant. The charge was—"In all cases of voluntary manslaughter, there must be some actual assault upon the person killing, or attempted by the person killed to commit a serious personal offense against the person killing."

Such as the court below was satisfied with the verdict, and a careful review of the evidence disclosed in the case.

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record we find nothing to cause us to be dissatisfied with it, let the judgment of the court below be affirmed.

THE ATLANTA AND RICHMOND AIR LINE RAILWAY COMPANY, plaintiff in error, *vs.* JAMES M. CAMPBELL, defendant in error.

1. An employee of a railroad company, suing the company for a personal injury sustained from the negligent performance of an act in which he participated, has not made a *prima facie* case for recovery, without proving, either that he was wholly free from fault himself, or that there was negligence on the part of his fellow servants. If he rests on a presumption of negligence without actual proof thereof, that presumption applies to him with the same force as to others who participated in the same act of common duty, and to get the benefit of the presumption as applied to the others, he must rebut it so far as it applies to himself.
2. The cases in *53 Georgia Reports, 488*, and *54 Ibid., 509*, compared and reconciled.
3. The evidence in the present case fails to establish, affirmatively, either basis of recovery; it leaves the plaintiff's diligence unvindicated, and it fixes no negligence on others.

Railroads. Negligence. Presumption. Before Judge RICE.
Gwinnett Superior Court. September Term, 1875.

Campbell, an employee of the Atlanta and Richmond Air-line Railway Company, brought case for personal injuries sustained by him. The jury returned a verdict for the plaintiff. Defendant moved for a new trial on the following, among other grounds: Because the verdict, under the evidence, was contrary to the following charges of the court:

1st. "That in order to entitle the plaintiff to recover in this case, it must appear from the evidence that the plaintiff was himself without fault, and the *onus* was on the plaintiff to show by proof that he was without fault."

2d. "That if the injury was the result of a pure accident, and that without fault on the part of defendant, then the plaintiff would not be entitled to recover."

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The motion was overruled, and defendant excepted.
 The other material facts will be found in the opinion.

JOHN COLLIER; T. M. PEEPLES, for plaintiff in error.

HILLYER & BROTHER, for defendant.

BLECKLEY, Judge.

1. We deal only with those grounds of the motion for new trial which question the sufficiency of the evidence to support the verdict, under the law applicable to the case. When the case was here on a former writ of error, (53 *Georgia Reports*, 3,) it was ruled, among other things, that for the plaintiff to recover it was necessary for him to show that the injury was caused without fault or negligence on his part. We see no reason to doubt the correctness of that ruling, on the material facts then in evidence, and now in evidence. The suit was for an injury alleged to have resulted from the negligent performance of work and labor in which the plaintiff actively participated. He was engaged, with others, in delivering telegraph poles along the line of the railroad, and in the act attempting to land one of the poles from the car, it was carried out of its proper course by striking against a standard. Before it came to rest, it threw the plaintiff off the car and he fell upon him. If the pole had been passed over the standard instead of being thrown when not lifted high enough to clear it, there is no reason to suppose that anything would have gone wrong. It was the failure to have the proper elevation, when the pole was put laterally in motion, that constituted the irregularity. The plaintiff, himself, was one of the persons who aided in lifting the pole and putting it in motion. Did he do his whole duty, or was it partly by his negligence or fault that the irregularity occurred? If he was not in fault, who was? Did the evidence show distinctly that any of the employees, other than the plaintiff, were negligent at this stage of the transaction, the irregularity would be accounted for. But it does not. There is the same abstract probability that he was derelict as that anybody else

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was, and the matter is left to be dealt with, either as misadventure, or as the result of negligence common to the plaintiff and his fellow servants. If he would affirmatively exculpate himself or inculcate them, either would be sufficient; but, not having done the latter, he is bound to do the former or fail in his suit. The proof of negligence, in others, adequate in its nature to have produced the particular effect to be accounted for, would change the *onus*. The presumption would then be, that as a sufficient cause was in sight, the whole cause was discovered.

2. It is obvious that suits against railroad companies by their employees for personal injury, present two classes of cases. In one, the injury is the offspring of some act in which the plaintiff participated; in the other, he is passive and the particular act from which his injury results, is performed wholly by other servants of the same master. This case, as reported in 53 *Georgia Reports*, *supra*, belongs to the former class, and it will be seen that the rule announced in the first head-note above is confined accordingly. Of the other class is the case in 54 *Georgia Reports*, 509; and this distinction will serve to reconcile the two cases. With some correction of phraseology, which is too general, both may be found worthy to stand as permanent rules of decision.

3. It remains only to add, that the evidence in the record before us is not sufficient to make a basis of recovery on either of the two lines of proof which have been indicated. The plaintiff, by reason of the loss of memory consequent upon the injury, has the misfortune not to know whether he performed his duty or not. We are impressed with his candor as a witness in his own case, and if the law could bend at all, we should deem his infirmity and veracity put together, as giving a claim on its favor. But the law is constant and impartial; neither has he succeeded in fixing any fault or negligence on any of his co-employees. The occurrence has, to us, the appearance of an accident, and we think there should be a new trial.

Judgment reversed.

 Lamp *vs.* Smith.

CAMP, plaintiff in error, *vs.* JAMES M. SMITH, *govr.*
defendant in error.

Je prosequi of a bill of indictment is a termination of the case pending that bill, with all recognizances and other incidents of that particular prosecution. A new bill for the same offense is a new case.

Holds that the forfeiture of a recognizance against a surety for the appearance of defendants to answer the old bill of indictment, so *not. pros'd*, is without authority of law. When that indictment was *not. pros'd* the case upon a bond growing out of it, either to take the case to the supreme court or to answer in the court below, was discharged.

Final Law. Indictment. Principal and security.
Judge KNIGHT. Milton Superior Court. March
1876.

Entered in the opinion.

GEORGE N. LESTER; E. P. HOWELL, for plaintiff in error.

J. PHILLIPS, solicitor general, for defendant.

JOHNSON, Judge.

Camp signed Hembree's bond for appearance to get a writ of *habeas corpus* to take the latter's case to the supreme court. The supreme court reversed the judgment below, pronouncing the indictment bad. The court below caused that judgment to be entered of record in the superior court as its judgment, and the solicitor general *not. pros'd* the indictment, and offered a new bill of indictment, which was found true by grand jury. Hembree failed to appear to answer the new bill, and his recognizance to take the case up on the old bill was forfeited against him and Camp, his surety. From the judgment forfeiting this bond, Camp appeals to this court, and assigns for error the judgment of forfeiture.

On the first bill was *not. pros'd* that case was terminated, and with it ended all incidents to it, including any connected with it. The security on any such bond was

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called the defendant. —
defendant had not appeared, Camp would have been liable then,
because the case was pending on which he was surety, but
when that case was *not. pros'd* Camp was released.

All the facts were of record, the solicitor general and the
court were bound to take knowledge of them, the court cer-
tifies their truth, and the record sustains his certificate. If,
through inadvertence or haste, he granted the judgment of
forfeiture, it is not the less error against the surety, and we
must reverse the judgment.

Judgment reversed.

JAMES M. CRUMP, administrator, plaintiff in error, *vs.* **MARION W. WILLIAMS**, defendant in error.

1. An administrator cannot be allowed to violate the law in the management of an estate, and then be heard to say, in response to a rule to show cause why his letters should not be revoked, that such violation was for the benefit of the estate.
2. In such a proceeding against an administrator it was error to charge that the jury should find for the movant if the respondent, or his securities, were likely to become insolvent. A removal on that ground is discretionary with the ordinary, and the jury, on appeal, should exercise the same discretion.
3. An immaterial error is no ground of new trial.

Administrators and executors. New trial. Before Judge
RICE. Franklin Superior Court. April Term, 1876.

Reported in the decision.

OF GEORGIA.

Williams.

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his power over Camp. Before
the new one, he should have
him over again. If the de-

J. B. ESTES; J. F. LANGSTON, for plaintiff in error.

S. P. THURMOND, for defendant.

WARNER, Chief Justice.

This was an appeal from the court of ordinary of Franklin county, on a rule to show cause why Crump, administrator *de bonis non*, with the will annexed, of Johnson Williams, deceased, should not be removed as administrator aforesaid, on the several grounds therein set forth. On the trial of the appeal in the superior court, the jury, under the charge of the court, found a verdict in favor of the movant; whereupon the administrator made a motion for a new trial on various grounds, which was overruled by the court, and the administrator excepted.

1. There is no conflict in the evidence that the administrator did not manage the estate as directed by the will of the testator, or in accordance with the requirements of the law, but it is insisted in his behalf, that although that may be so, still the estate was not injured, but on the contrary was benefitted by the illegal acts of the administrator. This defense by the administrator is not sufficient to prevent his removal under the provisions of the 2511th section of the Code. An administrator cannot be allowed to violate the public law of the state in the management of the estate entrusted to him, and then be heard to say that such violation of the law was for the benefit of that estate, when called on to show cause why his letters of administration should not be revoked.

2. The court erred, in our judgment, in charging the jury, "that if either the defendant or his securities are likely to become insolvent, then they should find for the plaintiff." The removal of the administrator on that ground was discretionary with the ordinary, and the court should have charged the jury that they might so find.

3. But inasmuch as the uncontradicted evidence in the record is such as to require the verdict rendered by the jury,

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on the other grounds alleged for the removal of the administrator, notwithstanding the aforesaid error, we will not disturb it.

Let the judgment of the court below be affirmed.

JAMES S. MORRIS, plaintiff in error, vs. JAMES J. & MOSES
OGLE, defendants in error.

1. In the superior court, the trial of a case cannot proceed, over the objection of the parties, without the presence of the necessary office papers, or of established copies. The defendant's counter-affidavit to the summary enforcement of a mechanic's lien, is a necessary paper, the issue on trial being presented by it.
2. After a counter-affidavit to the enforcement of a mechanic's lien is received by the sheriff, and the same, with the execution and levy and the order directing execution to issue, are returned by him to the clerk's office, all these papers are office papers of the superior court, and so remain until the trial directed by statute is had, and the matter is finally disposed of. Upon their loss from the office, that court may, at any time while the case is pending, establish a copy of one or more of them, upon motion.
3. Unless the contrary appears, this court will presume that the superior court had ample evidence that copies established were true copies.

Practice in the Superior Court. Mechanic's lien. Lost papers. Presumptions. Before Judge KNIGHT. Cobb Superior Court. November Term, 1875.

Reported in the opinion.

GEORGE N. LESTER; GARTRELL & DUNWOODY, for plaintiff in error.

W. P. McCLATCHY, for defendants.

BLECKLEY, Judge.

1. The enforcement of a mechanic's lien upon a gin-house, mill and the machinery therein, for labor and material furnished in building and repairing the gin-house and mill, was

resisted by a counter-affidavit, the proceeding itself being an execution founded, not upon a suit, but upon affidavits made by the creditors as mechanics. In other words, it was a summary foreclosure of mechanic's lien under the act of 1869, and the Code of 1868, section 1969. After the plaintiffs had submitted a part of their evidence, it was discovered that most of the papers pertaining to this case were missing—among them, the execution, with the sheriff's levy thereon, the order directing the execution to issue, and the defendant's counter-affidavit. The court proceeded with the trial, over the defendant's objection, without the presence of the papers, and without causing copies of any of them to be established. We cannot discover from the record that the court had any evidence of the contents of the papers, or that it was made aware what grounds were taken in the counter-affidavit. That affidavit, according to the Code of 1868, section 1970, presented the issue to be tried, and in its absence, with no copy of it, and no evidence of its contents, it would seem impossible for the court or the jury to have known precisely what was on trial. We certainly do not know from the record before us what was for trial, whether it was the amount of the claim, the justice of the claim, or the existence of the lien, or all three. It was competent, under the statute, for the affidavit to have traversed any one of these, or all of them together. The verdict found by the jury is for a specific sum of money, without any mention of the lien, and from this we might infer that the lien itself was not thought by the court and jury to be in controversy; but the record ought to have shown what was in controversy, and the trial should not have proceeded until that appeared. We rule that it was error to try the case without the original counter-affidavit or an established copy; and we think, also, that it would have been the better practice, even if not indispensable, to have required the other papers, if not found, to be established likewise before proceeding with the trial. The execution, the levy, and the order directing the execution to issue, ought to have been before the court.

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2, 3. While a motion for new trial was pending, the court, on motion of the plaintiffs, and over the objection of the defendant, permitted a copy of the execution and of the order directing it to issue, to be established. That is assigned as one of the errors committed. It was not too late to establish these papers, though their establishment ought not to have influenced the action of the court upon the motion for new trial, and perhaps did not. The papers were of a sort to be established on motion. They were office papers of the superior court, having been returned there in connection with this case by the sheriff after the filing of the counter-affidavit, and before the trial was had. Their loss from the clerk's office was conceded. The defendant denied, but not under oath, that the copies about to be established were true copies; but we are bound to presume that his denial was not supported by evidence, and that the court granted the order to establish the copies on full and proper evidence that they *were* true. The evidence on this part of the case is not brought up in the record or bill of exceptions, and we therefore cannot pronounce upon it otherwise than by invoking this presumption.

The judgment overruling the motion for a new trial is reversed, upon the ground that the case was tried, over the defendant's objection, without the presence of the counter-affidavit or of an established copy. Other grounds of the motion relate to subsequent matters, which need not be passed upon, as this fundamental error vitiated all that was done up to verdict.

Judgment reversed.

EPHRIAM L. BRASWELL, plaintiff in error, vs. JAMES W. PLUMMER, defendant in error.

A *bona fide* purchaser of land, in possession thereof for four years, without notice of any judgment or levy thereon, holds the land discharged from the lien of any judgment against the person from whom he purchased the

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same, though the land had been levied on before his purchase, no steps having been taken by the judgment creditor to enforce the levy until after four years' possession by the purchaser.

Levy and sale. Statute of limitations. Judgments. Vendor and purchaser. Before Judge RICE. Gwinnett Superior Court. September Adjourned Term, 1875.

Reported in the opinion.

WINN & SIMMONS, for plaintiff in error.

F. F. JUHAN, by JACKSON & LUMPKIN, for defendant.

JACKSON, Judge.

Braswell held an execution against Ford, and levied it upon Ford's land, but did not advertise for sale, or press the levy. Ford sold the land to Plummer, who held it more than four years without notice of the judgment or levy. After the four years possession by Plummer, Braswell pressed his old levy and advertised the land for sale. Plummer claimed it, contending that it was discharged from the lien of the judgment under section 3583 of the Code. The court below held that the land was discharged from the lien of the judgment, and that the title was in the claimant; and this is the ruling complained of and the sole error assigned. We think the court held the law right, and we affirm the judgment. An inactive levy lying dormant and without notice to an innocent purchaser is evidence of grosser negligence and greater wrong to the purchaser than no levy at all. The words of the statute (Code, section 3583) cover the case as well as the reason and spirit of the acts of 1822 and 1852; and the case of *Ruker vs. Womack*, 55 *Georgia Reports*, 399, controls it.

Judgment affirmed.

JEFFERSON BRYSON, plaintiff in error, vs. J. PERRY CHISHOLM, defendant in error.

1. Where it is sought to make property liable upon the ground that it was paid for with the money of the defendant in *fi. fa.*, though title was taken to claimant, his father; and it was replied that the land was given by defendant to claimant prior to date of plaintiff's judgment, it was error for the court to ignore the gift in its charge, and to confine the jury solely to the question as to who paid for the property.
2. When an erroneous charge is alleged to have been made by the court in a bill of exceptions, and the judge certifies the same as true, and the entire charge of the court is not in the record, this court will not presume that the erroneous charge was subsequently qualified so as to obviate or cure the alleged error unless the judge shall specially certify that such was the fact.
3. It is incompetent for a witness to state the "idea" of parties in making a contract. He must state the facts, and let the jury draw their own conclusions.

Levy and sale. Claim. Charge of Court. Evidence. Before Judge RICE. Gwinnett Superior Court. December Adjourned Term, 1875.

The facts of this case are reported in the decision.

WINN & SIMMONS, for plaintiff in error.

CLARK & PACE; E. P. HOWELL, for defendant.

WARNER, Chief Justice.

This was a claim case, on the trial of which the jury, under the charge of the court, found the property levied on subject to the plaintiff's *fi. fa.* A motion was made for a new trial on the several grounds set forth therein, which was overruled by the court, and the defendant excepted.

1. The main controlling question in the case, under the evidence in the record, was whether Jefferson Bryson, the claimant, held the land levied on under the deed executed on the 20th of April, 1864, to him as a gift from his son, Thomas M. Bryson, the defendant in execution, or whether he held the title to the land in trust for his son, the defendant. The court charged the jury, amongst other things, "In this case, if the

endant, Thomas Bryson, purchased and paid for the land procured the title to be made to his father, Jefferson Bryson, the claimant, the law implies a trust in favor of Thomas Bryson, and whilst Jefferson Bryson, the claimant, holds title, the beneficial interest is in the defendant, Thomas M. Bryson, and is liable and subject to the payment of his debts." The charge of the court decided the whole matter in controversy between the parties, so far as the question of a gift of property was concerned. The effect of the charge was to exclude from the consideration of the jury all the evidence in relation to a gift of the land by Thomas M. Bryson to his father, the claimant, and was error, in view of the evidence contained in the record.

It is true, that the judge, in an explanatory note to the bill of exceptions, states that the portion of the charge excepted to is only a part of the general charge of the court, the entire charge not being set forth in the record) and it is indeed that this court is bound to presume that the portion of the charge not excepted to was correct, and such is undoubtedly the general rule. But here is a specific charge of the error complained of which is vital to the claimant's case, and that charge is stated in view of the evidence in the record, to be a manifest error. When the court has not made the charge, or alleged, or qualifies it by other portions of the charge so as to obviate or cure the alleged error, then the judge may refuse to certify the bill of exceptions and return the same, as provided by the 4257th section of the Code, or the judge may certify, if he chooses to do so, what he did charge in relation to the grounds of error complained of in addition to the charge set forth, qualifying, or explaining the same, if such be the facts of the case. When an erroneous charge is alleged to have been made by the court in a bill of exceptions, and the judge certifies that such a charge is true, and the entire charge of the court is not in the record, this court will not presume that the court qualified that erroneous charge in its general charge so as to obviate or cure the alleged error, unless the judge shall specially certify that such was the fact.

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3. A portion of the testimony of F. M. Jack was excepted to, and as there is to be a new trial in the case, we will express our opinion in relation to its admissibility. The witness, after stating that he and the defendant, T. M. Bryson, having been partners in business, suspended the same in 1864, and divided the property, said that T. M. Bryson wanted to go north, and was in fear his land would be confiscated, and said he would deed him his half of the land if witness would deed the whole of it to his father, Jefferson Bryson, which witness did, making a deed to the whole of the land to Jefferson Bryson, but receiving no money from him; "the idea was that the old man could protect the property whilst T. M. Bryson was gone if he should have to leave the country." This latter part of the testimony of the witness was objected to, but was admitted by the court. In our judgment, the better and safer rule was to have excluded the testimony. When the witness states what "the idea was," he states what was his own idea, his own conclusion. Let him state what was said and done at the time, and leave the jury to have their own ideas, and draw their own conclusions therefrom; their ideas may be different from those entertained by the witness.

Let the judgment of the court below be reversed.

ARMINDA J. BOYD *et al.*, plaintiffs in error, vs. JOHN ENGLAND, defendant in error.

1. A deed conveying land to a husband in trust for the separate use of his wife and her children, born and to be born, clothes him with an executory trust, which does not become executed while the coverture subsists and the children are minors. And so long as the trust is executory the legal title cannot vest in the beneficiaries.
2. Upon such a deed, the wife, suing for herself, and as the next friend of her minor children, cannot, pending the coverture, recover the land at law from a person in possession under a conveyance from the husband as trustee, without bringing the trustee in as a party, nor without alleging and proving such facts, and submitting to such terms as would entitle her, under the circumstances, to obtain a decree for the premises in a court of equity.

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3. No court can remove a trustee and appoint a successor in a proceeding to which the trustee is not a party.
4. When the verdict is right, on the evidence and the law applicable to the case, errors in the charge of the court are immaterial.

Trusts. Husband and wife. Charge of Court. Before Judge KNIGHT. Union Superior Court. May Term, 1876.

Reported in the opinion.

C. D. PHILLIPS; J. A. BULL; W. T. DAY, for plaintiffs
in error.

J. S. FAIN; C. J. WELLBORN; GARTRELL & WRIGHT,
by brief, for defendant.

BLECKLEY, Judge.

In 1861 a deed was made conveying certain land to a husband, in trust for the separate use of his wife and her children, born and to be born. Some years afterwards the husband, as trustee, conveyed the premises to a purchaser. In 1875 the wife; suing in her own behalf and as next friend of her minor children, brought suit against the purchaser to recover the premises, with *mesne profits*. The action was, in the brief statutory form authorized by the Code for the recovery of real estate, with the addition of a special averment to the effect that the trustee had abandoned his wife, and failed and refused to execute the trust, and closing with a prayer for general relief and for the appointment of another trustee. The case was tried and a verdict had for defendant. A motion for new trial was overruled.

1. There can be no doubt that the trust raised by the deed was executory, and that it would so remain while the coverture subsisted and the children were minors. It follows that there has been no vesting of the legal title in the beneficiaries, for the coverture is not at an end, nor have the children attained majority. It may be that more are yet to be born.

2, The sole title upon which the plaintiff relied for a recovery was this trust deed; but according to her own showing



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the legal title is either in her husband, as trustee, or in the defendant as purchaser under him. The plaintiff's position is, that the latter acquired no title as against her and her children, because the sale was not made conformably to law. Let that position be granted, and still she and her children are without any title upon which a recovery can be had in a court of law. It is true that with us the superior court can administer equitable relief, on the law side as well as on the equity side of the court; but for that to be done, there must be proper parties, proper averments in the pleadings, and proper evidence. In other words, whether the action be at law or in equity, the plaintiff must plead and prove a case which would entitle her to a decree in a court of equity. And this she has not done. The trustee is a necessary party, and he is not brought in; and in the matter of evidence, the record before us contains not one word on the subject of abandonment. Moreover, there is some evidence going to show that a part of the proceeds of the sale of this land was invested in other lands, and that the plaintiff is in the enjoyment of the latter. The surrender by her of all the fruits of the sale in her possession would be a condition of setting the sale aside. She would have to submit to the same terms in a court of law as in a court of equity; and she has neither performed nor offered anything in that way. As the case stood at the trial, on the pleadings and the evidence, it was legally impossible for her to recover.

3. The prayer for the appointment of a new trustee could not aid her. Her husband, who was no party to the proceeding, was vitally interested in that question. No court could substitute another in his place as trustee, and divest whatever title he might have, without giving him an opportunity to be heard as a party.

4. No verdict could have been legally rendered other than the one that was rendered, and hence the motion for a new trial was overruled. It would be utterly useless to rule upon the grounds of the motion imputing error to the court in charging the jury, and in refusing to charge as requested, for what-

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errors, if any, were committed, were harmless. To discuss and point them out would not enable us to reverse the judgment.

Judgment affirmed.

MAS RIDLING, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

It is a fact that the court directed twenty-four men, summoned as grand jurors, to retire to the grand jury room and excuse the last man on the list, there were twenty-four, and then organize by electing a foreman, and the twenty-three return with the foreman to be then sworn, which was done, and does not vitiate an indictment afterwards found by the sworn jury. A grand jury is not complete and organized for business until sworn.

It is not error in the county judge, acting as both judge and jury, after a case is heard before dinner, and his decision withheld until after dinner, to hear additional evidence after dinner, the defendant not making it appear that he was thereby injured by the absence of witnesses or otherwise.

It is not error by the state that a dealer in spirituous liquors sold to a minor, and the parent or guardian was not present and assenting at the time of the sale, makes such a *prima facie* case that the sale is made without first obtaining authority of such parent or guardian, as to authorize a conviction in the absence of all proof to the contrary, especially when such parent resides in a distant county from the venue of the crime.

It is not error in the burden of showing that the retailer did not first obtain the authority of the parent or guardian upon the state, or is it not upon the vendor to show that he first obtained it? *Quare.*

Criminal law. Indictment. Jury. Practice in the Supreme Court. Before Judge RICE. Clarke County. At Chambersburg, April 3d, 1876.

Reported in the opinion.

W. B. THOMAS, for plaintiff in error.

J. L. MITCHELL, solicitor general, for the state.

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JACKSON, Judge.

The defendant was indicted in the superior court for the offense of selling spirituous liquors to a minor without having first obtained the authority of the parent or guardian. The indictment was transmitted to the county court, and the defendant was tried there before the judge, without any jury, on both law and fact. The defendant was convicted, and applied for a *certiorari* on various grounds alleged therein; the *certiorari* was refused, and defendant excepted.

1. The first ground of complaint is that when the grand jury was called by the sheriff it was suggested that there were twenty-four men, and the court, instead of reducing them to twenty-three himself, told them to go to their room, and if there were twenty-four to strike off and excuse the last man, then choose a foreman and return and be qualified. The whole complaint is that the court told the grand jury, *before it was organized and sworn*, if, on count, there should be twenty-four, to reduce itself to the legal number by doing just what he would have done and what the law required to be done, to-wit: *striking the last man on the list*, the last summoned. We are at a loss to see any error in it or any harm done defendant by it.

2. The next ground is that the county judge, at the close of the testimony before dinner, said he would render his judgment after dinner, but after dinner he reopened the case and heard other evidence. It is not shown that the defendant had witnesses absent after dinner to rebut the additional evidence, or was otherwise hurt. He asked for no continuance, and would have been no better prepared at another time. The facts and the judgment would have been just the same so far as is made to appear. We see no error at all in this proceeding.

3. The third ground is that the facts and law do not make a case for conviction. The facts are that the defendant sold whisky, a spirituous liquor, to the minor; that the minor had no authority from his father, who lived in Atlanta, to buy;

that his father was not present giving his authority at the time of the sale, and had not been in Athens, the place of the crime, in the last two years. This evidence, we think, is abundant to make out a *prima facie* case of guilt beyond any reasonable doubt, even if the burden be upon the state to show *want of authority by the parent to sell*. Upon that point we express no decided opinion and make no positive ruling. The statute, acts of 1875, page 102, is very strong in laying down the prerequisite which alone can justify this crime. The language is, "without first obtaining the authority from the parent or guardian." The retailer must *first* obtain the authority—the license—the permission of the parent. The act in regard to allowing minors to play ten-pins or billiards, Code, section 4543, is not so strong. The salient words there are "without the consent of the parent or guardian;" and whilst in the latter case this court, in 50 *Georgia Reports*, 103, puts the burden upon the state to show that there was no consent by the parent, we hardly think the cases exactly analogous. Certainly to sell liquor to a minor is worse than to let him play billiards, and the requisition to obtain *first the authority* of the parent is stronger than the words "*without the consent*," etc. For myself, I incline strongly to the conviction that the defendant, having *first* to obtain authority before he can with impunity do this great wrong to a minor for a little money, ought to be required to show *his authority so first obtained*, as in the case of license to sell the liquor at all; and that proof of the sale to the minor by the state, without more, would be enough to convict, unless he showed his authority. But we put the query to the profession and rest there for the present, as this case does not demand a decision on that point.

The crime is against society, against youth, against policy, morals, everything good; and the doubt should be very reasonable before the criminal should be allowed to escape unwhipped of justice. Very slight evidence should suffice to prove the negative that a sane parent never gave a dram-seller authority to ruin his son, and thus to shift the *onus*, if

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on the state at all, upon the defendant. In this case we think the evidence ample, and have no doubt, if such authority had been obtained, he who obtained it would have proved it. He is, therefore, properly and legally convicted; and the punishment, a little fine of \$25 00, is, I think, a mere trifle compared with the gravity of the crime.

Judgment affirmed.

HENRY STEPHENS, plaintiff in error, vs. THE STATE, defendant in error.

To complete the offense of uttering a forged paper, it must not only be published as true when the party knows it to be fraudulent, but also with intent to injure some one.

Forgery. Verdict. Motion in arrest of judgment. Before Judge KNIGHT. Fannin Superior Court. May Term, 1876.

For the facts of this case, see the decision.

WIER BOYD; JOHN S. FAIN, for plaintiff in error.

C. D. PHILLIPS, solicitor general, for the state.

WARNER, Chief Justice.

The defendant was indicted for the offense of forgery, and charged in one count of the indictment with having falsely and fraudulently passed and uttered as true a certain false, forged and counterfeit order for goods. The jury, on the trial of the case, instead of returning a general verdict of guilty, returned the following verdict: "We, the jury, find the prisoner guilty of passing a forged order, knowing it to be such." A motion was made in arrest of judgment, which was overruled by the court, and the defendant excepted.

This case comes within the ruling of this court in *Couch vs. The State*, 28 *Georgia Reports*, 367, and is controlled by it.

Let the judgment of the court below be reversed.

THOMAS D. MEADOR, plaintiff in error, vs. THE DOLLAR SAVINGS BANK *et al.*, defendants in error.

1. When an indorsement, as declared upon, is not in blank but in full, and there is no plea of *non est factum*, or other equivalent plea, and no averment that there was any want, or failure, or illegality, of consideration, or that the indorsement was made in blank, or that a collection was contemplated for the indorser's use and not for the use of the indorsee, parol evidence to explain the indorsement or vary its legal effect, is not admissible.
2. With proper pleadings to lay open the question, parol evidence is admissible to negative or vary the presumptive undertaking of the indorser, arising out of a blank indorsement made since the adoption of the Code, unless the rights of a *bona fide* holder have intervened. And it makes no difference, that since the indorser put his name on the paper, the usual terms of a full indorsement have been written over it, the indorser not having assented thereto.
3. A bank certificate of deposit, payable to the order of the depositor, but indicating no time of payment other than can be inferred from the words, "interest at the rate of seven per cent. on call, and ten per cent. per annum," is payable on demand, and, therefore, due immediately; and *bona fide* holders are affected with the equities existing between parties prior to themselves.
4. A verdict in favor of the only defendant who tendered an issue for trial, which issue related exclusively to his own several liability, having been returned into court and published, and, thereupon, the jury having been remanded to their room to perfect the verdict by finding, *pro forma*, as to the other two defendants, it was too late for the plaintiff to dismiss his whole action. After so much had transpired, the litigating defendant was entitled to have a verdict recorded for his protection.

Indorsement. Evidence. Pleadings. Banks. Contracts. Practice in the Superior Court. Before Judge HOPKINS. Fulton Superior Court. October Term, 1875.

Reported in the opinion.

BENJAMIN F. ABBOTT; JOHN D. CUNNINGHAM, for plaintiff in error.

JOHN A. STEPHENS; JULIUS L. BROWN, for defendants.

BLECKLEY, Judge.

The suit was by Meador, on three certificates of deposit, against the Dollar Savings Bank, as maker, and Lynch and

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Goldsmith, as indorsers. Each certificate was payable to the depositor's order, with "interest at the rate of seven per cent. on call, and ten per cent. per annum." There was no other specification as to the time of payment. The declaration was in the short statutory form, with a copy of each certificate, and of the indorsements thereon annexed. On each certificate was an indorsement, over the signature of Lynch, in these words: "Pay to the order of J. W. Goldsmith," followed by an indorsement, in blank, by Goldsmith. Two of the certificates applied to deposits made by Lynch, and the third applied to a deposit made by Cassin, a person not sued, but whose indorsement in blank on this certificate appeared with the other indorsements, as copied below the declaration. Thus, as to Lynch, the action was founded upon full indorsements, and as to Goldsmith, upon blank indorsements. Lynch was the only defendant who pleaded or made defense. Besides the general issue, he filed, on oath, several special pleas, some of which are immaterial to any of the points argued in this court, or to any ruling which we make touching the case. The substance of those now relevant, was that Lynch indorsed without any design or intention to guarantee the contracts of the bank, or to engage to pay the money mentioned in the certificates; that Goldsmith took them with that understanding; that such instruments are known and called, by all men of business, certificates of deposit, and not bills or notes; that they pass solely upon the credit of the bank issuing them; that neither Goldsmith nor the plaintiff took them upon the credit of defendant's name; that defendant indorsed them for the purpose of collection only, and not for the purpose of guaranteeing their payment; that they were transferred by Goldsmith to the plaintiff, after due, and only colorably, to prevent defense, and to enable the plaintiff to collect for Goldsmith's benefit. There was no averment that Lynch indorsed in blank, or that anything had been written over his signature, or that the indorsements in full as set out in the copies annexed to the declaration were not his act or deed. Neither was it averred that there was no consideration for the indorse-

ments, or any failure or illegality of consideration, or that the collection contemplated was for Lynch's use, and not for the use of Goldsmith.

1. At the trial, the court admitted parol evidence tending to prove that the certificates were sold by Lynch to Goldsmith on an express agreement that Lynch was not to be liable as an indorser, or otherwise; that the indorsements by him were in blank, and made solely for the purpose of enabling Goldsmith to collect from the bank, etc. The admission of some of this evidence over the plaintiff's objection is one of the grounds of the motion for a new trial. Having in mind the state of the pleadings, we cannot doubt that it was inadmissible. The action, as against Lynch, was not based on blank indorsements, but on indorsements in full. They were regularly declared upon, according to a form of declaration sanctioned by statute. If, as set out, they were not such as he made, they were either not his at all, and he should have denied them by a plea of *non est factum*, (Code, sections 2851, 2855,) or they were his, qualified by the special fact that they were executed in blank, and by the further fact that their ordinary legal effect was obviated by a special agreement, and he should have pleaded both the blank execution and the special agreement. In the pleas which he filed there was no hint that he indorsed in blank, or that anything had been written which he had not expressly authorized. He answered to the indorsements as the plaintiff set them forth; and, without averring anything against their form, undertook to combat their legal effect. Thus stood his case on the record. His evidence went to establish quite a different case. Prior to the Code, even a blank indorsement was not subject to be modified in its legal effect by parol evidence: 4 *Georgia Reports*, 106, 266; 33 *Ibid.*, 491. The Code, section 3808, changes that rule, but it does not expose any other indorsements to like modification. Where a question of consideration is raised, or a question of bailment for the purpose of collection, doubtless, on general principles, other indorsements can be reached, as well as those in blank: 22 *Georgia Reports*, 24; 30 *Ibid.*, 946; but this

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section of the Code cannot be extended to them without straining it with unwonted and unwarrantable violence. And in any case, when *mistake* is the ground relied upon, it must be alleged.

2. Under the Code, unless *bona fide* holders are prejudiced, all indorsements made in blank are open to explanation by parol: 43 *Georgia Reports*, 382. While this is a change in our own law, it is not altogether a novelty, as appears in 2 *Parsons on Notes and Bills*, 518, 519, and many cases there cited. The Code cuts us loose from the rule which prevails in New York and some other states, and puts us under the opposite rule which many of the states recognize and administer. It was argued before us that, as a blank indorsement is authority for filling it up with the usual words appropriate to an indorsement in full, parol evidence would be no longer admissible after this was done. We think otherwise. The right to explain would be worthless if it could be thus defeated. No implied authority is delegated which is not accompanied and qualified by the whole law of the transaction. Though the holder may supply the ordinary words, according to commercial usage, in so doing he does not change the fact that the indorsement was executed in blank; and, incident to that class of indorsements, is the right to explain, as against all holders not protected by their *bona fides*. With proper pleadings to admit the truth in evidence, the indorsement will be considered as continuing in its original state. Once in blank, always in blank, so far as the right to explain is concerned.

3. In this case the equities between prior parties would affect the plaintiff. The certificates are virtually payable upon "call," which means, we think, the same as demand; and paper payable on demand is due immediately: Code, section 2791. For a holder to be within the rule of protection, he must have acquired his title before the instrument became due; *Ibid.*, sections 2785, 2786.

4. The plaintiff's motion to dismiss his action came too late. He might have dismissed as to the maker and the non-

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litigating indorser, and that privilege was not denied him. But a verdict for Lynch had been brought into court and read, and the jury, at the time of the motion to dismiss, had nothing before them but the *pro forma* disposition of the case as to the other defendants. They had been sent back for that purpose, and not to reconsider their finding as to Lynch. The result of the trial, as to him, had been reached and become known. The plaintiff had lost his wager, and it was too late for him to withdraw the stake: 7 *Georgia Reports*, 191; 34 *Ibid.*, 572. We direct a new trial for the sole reason that, on the pleadings, no evidence was admissible to impugn or vary the indorsements.

Judgment reversed.

JAMES P. SIMMONS, plaintiff in error, *vs.* **LODAWICK M. CATES et al.**, defendants in error.

1. The assignee of two judgments from different plaintiffs against the same defendant, on the older of which judgments there is a security, and on the younger there is none, must apply money raised by the sheriff from defendant's property to the older judgment. If he apply it to the younger, the surety is discharged *pro tanto*.
2. It makes no difference in principle if the assignee, being purchaser of the property sold by the sheriff, does not actually pay the money to him, but it is considered paid, and is applied to the junior judgment.

Assignment. Principal and surety. Levy and sale. Before Judge RICE. Gwinnett Superior Court. September Adjourned Term, 1875.

Reported in the opinion.

JAMES P. SIMMONS, for plaintiff in error.

F. F. JUHAN, by **JACKSON & LUMPKIN**, for defendants.

JACKSON, Judge.

Simmons bought from Hudson a judgment against Cates, with Culver, as surety on appeal, and he bought from Spence

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a judgment against Cates with no security. Property of Cates was levied upon and sold, and Simmons bought it; and as he controlled both judgments, as assignee, he did not actually pay the money over to the sheriff but took a deed to the property from him and credited the amount upon the Spence *fi. fa.*, which is of younger date than the Hudson *fi. fa.* Subsequently Simmons sought to enforce the older *fi. fa.* against the surety, Culver. This was resisted on the ground that the application of the proceeds of the principal's property by the sheriff, and Simmons to the younger *fi. fa.*, was an act that injured the surety and released him. The court held the surety discharged by this act of Simmons, he excepted, and the question is before us for review.

Any act of the creditor, *either before or after judgment*, which injures the security, or increases his risk, or exposes him to greater liability, will discharge him: Code, section 2154. The act here complained of is the application of the fund brought by the sheriff's sale from the principal's property to a junior judgment, and the question is, did that act discharge the surety? In 4th *Georgia Reports*, 356, it is distinctly ruled that such a fund must be applied to the older *fi. fa.*; that it is not at the option of the plaintiff to apply it as he pleases, but that *the law* applies it to the older lien. In 11th *Georgia Reports*, 636, it was held that if an execution creditor, by his consent and direction, he having the older lien, allows a payment of funds in the sheriff's hands to be made to a junior *fi. fa.*, it *extinguishes* his older lien *pro tanto*, if third persons are prejudiced thereby.

Does the extinguishment of this older lien in this case hurt this surety? It certainly does. He would be entitled to control that judgment when he paid it off; but if he sought to enforce it against any third person who had bought the principal defendant's property since the lien attached, he would be met by the pleas that, as against such third person, the creditor in *fi. fa.* had, by this act, extinguished the lien of the judgment on which he was surety. Thus this act of the creditor, Simmons, in this case, by extinguishing this lien of

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this older judgment, so far as third persons are concerned, has injured this surety, increased his risk, and exposed him to greater liability. This act, therefore, has, under section 2154 of our Code, discharged the surety. Of course, it does not matter that the money was considered paid, and not actually paid, Simmons owning both judgments, and being the purchaser at the sheriff's sale. It is enough that the fund was raised by sheriff's sale, and applied, by Simmons' direction and consent, to the junior lien.

Judgment affirmed.

SHADRACK T. CRAWFORD, executor, plaintiff in error, vs.
CHARLES SPURLING, defendant in error.

1. Where a general judgment creditor prays for an injunction and the appointment of a receiver, on the ground that a claim has been interposed, under a pauper affidavit, for the purpose of delay, and that, by the depreciation in value of the property, there is danger of losing his debt, but shows no special lien, there is no abuse of the discretion of the chancellor in refusing to grant such prayer.
2. The defendant in *fa. fa.* is a necessary party to such proceeding.

Claim. Injunction. Receiver. Lien. Parties. Before Judge CLARK. Schley County. At Chambers. June 20th, 1876.

Reported in the decision.

GUERRY & SON, for plaintiff in error.

HAWKINS & HAWKINS, for defendant.

WARNER, Chief Justice.

This was a bill filed by the complainant against the defendant praying for an injunction and the appointment of a receiver. Upon hearing the motion to show cause the presiding judge refused to grant the injunction prayed for, and the complainant excepted.

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1. The equity of the complainant's bill, as alleged therein, is that he is a judgment creditor of one Sims; that the debt due him is for the purchase money of a certain described tract of land, which he has had levied on, but which has been claimed by one Spurling under a pauper affidavit; that the land has greatly depreciated in value, and is continuing to depreciate, and will not be sufficient to satisfy complainant's debt; that Sims is insolvent, and that the claim has been interposed to prevent the collection of his debt. Wherefore he prays for an injunction and the appointment of a receiver to take possession of the property. The complainant does not seek for the appointment of a receiver on the ground that the land levied on is specially charged with the payment of his debt, or on the ground that he has any specific lien thereon, but only claims a general lien on the land as a general judgment creditor, and such being the case, there was no abuse of the discretion of the chancellor in refusing the injunction and the appointment of a receiver.

2. Besides, Sims was a necessary party to the bill, whereas there is no process of *subpoena* prayed against him. Spurling is the only party required in the prayer of complainant's bill to appear at the next term of the superior court, to stand to, abide and perform the decree of the court.

Let the judgment of the court below be affirmed.

SCHWAB F. CHARLES, plaintiff in error, vs. JOSEPH D. FOSTER, defendant in error.

1. Claim affidavit and bond, purporting to be executed in another state before a notary public thereof, cannot be received by a levying officer in this state without due authentication: See *21 Georgia Reports*, 208, 161.
2. The seal of the notary is not authentication; nor is the certificate and seal of the clerk of a court of record, without a further certificate from the judge, chief justice or presiding magistrate of such court.
3. The claim papers being unauthenticated, and the only security upon the bond being a non-resident of this state, and so appearing on the face of the in-

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strument, a deputy sheriff who received the papers and accepted the security, and who, for no reason but the interposition of this claim, failed to sell land which he had under levy and advertised for sale, is, *prima facie*, liable to rule for the money which he ought to have raised by a sale of the land; and his sworn answer that he acted in good faith will not protect him, it not appearing that he made any effort to enlighten his good faith with proper knowledge.

4. It is not matter for answer to a rule for not selling property levied upon under an execution founded on the judgment of a court of competent jurisdiction, that the judgment was obtained by fraud. The levying officer cannot go behind the judgment to excuse his delinquency.
5. Where there is no clerk's certificate attached to the bill of exceptions, but the certificate to the record stated "that the accompanying is the original bill of exceptions in said case," and both papers reached the clerk's office of the supreme court together, the writ of error will not be dismissed. (R.)

Levy and sale. Claim. Rule. Comity. Practice in the Supreme Court. Before Judge KNIGHT. Forsyth Superior Court. April Term, 1876.

The opinion and the fifth head-note sufficiently report this case.

GEORGE N. LESTER, by C. D. PHILLIPS; RICHARD P. LESTER; ISAAC S. CLEMENTS, for plaintiff in error.

H. P. BELL; H. L. PATTERSON, for defendant.

BLECKLEY, Judge.

A deputy sheriff being ruled by the plaintiff in *fi. fa.* for not selling certain land which had been duly levied upon and advertised for sale, made answer that the sale was not had because of the interposition of a claim by a third person, not a party to the execution. The plaintiff traversed that part of the answer. It appears from the record that the claim referred to by the officer was an affidavit and bond purporting to have been executed in the state of Illinois, before a notary public of that state, and that both the claimant and her security in the so-called claim bond appeared on the face of that instrument to be residents of Illinois. The attestation of the notary to the affidavit, was under his seal of office, or

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what purported to be such ; and the clerk of a court of record, under what purported to be the seal of said court, certified that the notary was duly commissioned, sworn and acting as such, that he was authorized to administer oaths, that the clerk was well acquainted with his handwriting, and verily believed his signature to be genuine. There was no certificate of any judge, justice or magistrate touching the clerk or his attestation. The bond, as copied in the record before us, was unattested ; but the same notary whose name appeared to the affidavit, certified, under his seal of office, that he had examined, on oath, the security upon the bond ; that the bond, from the best evidence at the notary's command, was amply sufficient indemnity for the amount therein specified, over and above all homestead and other exemptions allowed by the laws of Illinois, and that he, the notary, verily believed the bond sufficient for the purposes therein set forth.

1. An affidavit sworn to out of this state cannot be recognized here without due authentication : 21 *Georgia Reports*, 208 ; *Ibid.*, 161. And there is the same reason for requiring the execution of a claim bond to be authenticated. Unless these papers were both duly authenticated, the officer, for that reason, if for no other, ought to have rejected them.

2. As to notarial acts in the line of commerce, the seal of a notary public will serve for authentication : Code, section 3829. But in administering an oath, or taking bond, to be used in an ordinary claim case, the notary is out of the sphere of commerce ; he is a mere magistrate or justice of the peace, and when his act passes beyond his own state, his certificate and seal, unsupported, are worth nothing. He is there an official stranger, and needs a formal introduction.

3. And the certificate of the clerk of a court of record, under what purports to be the seal of the court, will not vouch for him. There is no law, common or statute, that makes such a voucher sufficient. Under the act of congress, even the judicial proceedings of the court itself could not be authenticated thereby, without a further certificate from the judge, chief justice or presiding magistrate, that the clerk

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attestation was in due form.' If the letter of the act of congress does not apply to the case before us, its spirit does, as there is certainly no reason for holding the clerk competent, by his mere certificate and seal, to impart authenticity to the act of the notary, when, by like means, he could not impart authenticity to the proceedings of the very court which he serves as clerk. We think, too, the uniform practice has been in accordance with this view of the matter. The claim which the officer accepted had the double infirmity of lacking authentication, and of presenting no sufficient security. The security, as well as the claimant, was a non-resident of this state. It is not shown, or, so far as we know, contended, that the security had any property or effects within this state. So far, therefore, from being good security, he was in a situation to be enjoined were he here engaged in a legal contest in regard to his own credits and liabilities; and the very ground for injunction would be that what he might owe or be found liable for, would be unsafe, or could be realized only in a foreign jurisdiction: 6 *Georgia Reports*, 220; 10 *Ibid.*, 128; 19 *Ibid.*, 277. The mere fact of non-residence subjects a party to attachment for his own debts: Code, section 3264. Is such a person fit to be taken as security in a legal proceeding? Surely not. When the statutes of Georgia authorize an officer of court or any ministerial officer to take security, the security contemplated is one within the jurisdiction of this state, amenable to our laws, and subject to be acted upon by our own courts. When the law of one sovereignty calls for security, it means a security within its own reach, and not a security which can be reached only through the law of another sovereignty. With reference to their domestic jurisprudence and internal administration, the American states stand to each other as foreign countries; and, upon principle, a Georgia sheriff might as well accept, as security on a claim bond, an inhabitant of Paris as an inhabitant of Chicago.

The officer in the present case answers, on oath, that he acted in good faith, and his counsel insists that if he committed an error in receiving the claim and in treating it as valid,

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it was an honest mistake, and, therefore, that the plaintiff's remedy is by action and not by rule and attachment. Whether the officer acted in good faith must be judged of, not by himself, but by the court, and the decision must be controlled by all the facts and circumstances of the particular case. Each case must stand on its own merits. What may have been the private thought and motive of the officer we cannot certainly know, but we can see in the facts nothing to have misled him in his duty. Courts must be slow to accept ignorance of law as an excuse for official misconduct: 32 *Georgia Reports*, 362. An officer must be diligent as well as honest. Not only must he purpose and intend to perform duty, but he must use his intelligence to discover what duty is; and if his own intelligence is not sufficient to deal with as plain a case as this, he cannot safely dispense with counsel. A sheriff is not required to keep an attorney to guide him; but if he cannot make his way through questions not more difficult than the average, he ought to take advice from some person better informed than himself. We think almost any intelligent business man could have suggested that a person residing in Illinois could not be a proper security on a claim bond in Forsyth county, Georgia. The answer to the rule does not pretend that the deputy sheriff took advice, or sought it, or that it was inaccessible. We do not say that greater diligence on this line would have afforded him absolute protection, but it would, at least, have given an appearance of probability to the hypothesis of good faith.

4. The answer, in one part of it, assails the judgment as fraudulent upon which was founded the execution that was levied on the land. That is not matter for such an answer. The judgment was rendered by the superior court of Forsyth county, and nothing is averred in denial of the competency of the court in point of jurisdiction. It is the business of the sheriff and his deputy to obey process of execution, and not to raise disputes with a plaintiff about fraud in his judgment.

The court below erred in discharging the rule; and we di-

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rect that the case be reheard, with permission to the officer to amend his answer as he shall be advised.

Judgment reversed.

WILLIAM R. PHILLIPS, plaintiff in error, vs. MILES G. DOBBINS, defendant in error.

1. Section 3583 of the Code, which reads as follows: "When any person has *bona fide*, and for a valuable consideration, purchased real or personal property, and has been in the possession of such real property for four years, or of such personal property two years, the same shall be discharged from the lien of any judgment against the person from whom he purchased," construed to mean that no person in the sense of this section is a *bona fide* purchaser who has actual knowledge of the judgment, and that four years' possession will not protect a purchaser with actual notice of the judgment.
2. An attorney at law to sue for and collect a claim, cannot bind his client without his consent, by a release of any of defendant's property from the lien of the judgment he obtains.

JACKSON, Judge, dissenting:

1. The words "*bona fide*" mean in Latin, in their common anglicised signification, and in their legal technical sense, good faith, which words simply antagonize bad faith, and import honesty, fairness and the absence of all fraud and collusion. Therefore a purchaser may buy *bona fide* though he knows that a judgment exists against his vendor; and despite such knowledge, he does actually and truly buy *bona fide*, if, at the time he purchased the land, he was informed by the attorney of the plaintiff in *fi. fa.*, that he, the attorney, had "exclusive control" of the *fi. fa.*; that there was an abundance of other property bound by it; that he would put all that property between the *fi. fa.* and the land purchased, if he bought, and that he would relinquish at once the lien of the judgment upon this land but for the fact that the law would thereby discharge all the other property also from its lien; and if the facts show that the purchaser paid full value for the land, and would not have paid it and consummated the trade but for the assurance of the attorney, and especially if the judgment was in the hands of the attorney as collateral security and he thus represented several parties, and was thus, of all men, the proper person to whom the purchaser should go for the truth, and more especially if it appears that the other property bound by the lien depreciated in value after the letter of the attorney and the consequent purchase on the faith of it, and that the attorney was delayed in pressing the judgment upon the other property by the

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fact that the plaintiff in *f. fa.* had a law-suit in which the defendant in *f. fa.* and vendor of the purchaser was a witness, and the attorney was from time to time directed by the plaintiff not to press the judgment, because he wished his witness to be friendly to him till the termination of that suit.

2. The question is not whether the attorney can relinquish the property of the debtor from a lien of the judgment of his client, but the question is whether the purchaser for value, before he pays all the purchase money to the defendant in *f. fa.*, can show his good faith in the purchase by proving that he went to the best possible source of information, and got the information in good faith, and acted upon it in good faith.
3. Actual knowledge of the judgment may be a circumstance tending to show bad faith, and if accompanied by proof that the purchaser had got the land for a less price, or colluded in any way with the defendant in *f. fa.* to the hurt of the plaintiff, it would show bad faith in the purchaser, and defeat the bar of the four years' possession; but when such knowledge is accompanied only by facts which show the utmost honesty and good faith, and not a suspicion of fraud or collusion is shown in the purchaser, justice and common sense, as well as law, demand that four years' possession without disturbance shall protect him in his purchase and discharge the lien of the judgment, especially when other property bound by the judgment depreciated in value by delays caused by the plaintiff's direction not to levy.
4. A levy within the four years, immediately dismissed without any legal impediment, is not such a disturbance as to mar the peacefulness of the purchaser's possession, especially when no legal notice was given the claimant.
5. Opinion of the majority of the court in *Sanders vs. McAffee*, 42 *Georgia Reports*, 250, approved.

Judgments. Liens. Statute of limitations. Attorney.
Before Judge PEEPLES. Fulton Superior Court. April Term, 1876.

On December 21st, 1866, execution issued from Fulton superior court against one J. J. Morrison, as trustee for his wife, under a judgment in favor of John T. Wilson. On the 4th of July, 1874, it was levied on a certain piece of land, by direction of D. F. Hammond, attorney at law of William B. Phillips, the assignee of Wilson. Dobbins interposed claim, and issue was joined. Claimant pleaded, specially, that he purchased the place from Morrison, trustee; and that he was led to pay the entire purchase money to said Morrison by the written representations of D. F. Hammond, the attorney at law of Phillips.

On the trial, the *fi. fa.* against Morrison was introduced in evidence, with a number of indorsements thereon. Some of these were entries of credits by the attorney of the plaintiff. There was also an assignment by Wilson to Phillips; and an entry by the sheriff of a levy made, under the direction of plaintiff's attorney, upon the land now in controversy, on October 7th, 1872. Following this was a dismissal of this levy, by order of plaintiff's attorney, on 25th January, 1873.

M. G. Dobbins testified that he purchased the property from Morrison on August 24th, 1869, took a deed thereto, went into possession, and has been so ever since; knew of the judgment and execution against Morrison before purchasing. G. W. Adair acted as agent for the sale of the place; refused to close the trade with him until the title was made clear. Said Adair brought witness a letter from D. F. Hammond, plaintiff's attorney, which represented that he could purchase without fear of levy from *fi. fas.* in his hands. Witness thereupon purchased and paid for the place, in perfect good faith. In October, 1872, saw this property advertised for sale under the Phillips' *fi. fa.* Went at once to Hammond, who said that he had forgotten about the letter to witness, and promised to dismiss the levy. Never received any written notice of such levy. Acting on the faith of Hammond's letter, paid \$10,000 for the aforesaid place. Heard no more of the *fi. fa.* until the present levy.

G. W. Adair testified as follows: Is a real estate agent. Sold this property to claimant in August, 1869. Claimant finding there were liens upon the property, referred witness to Hammond, as the attorney of certain plaintiffs in *fi. fa.* Went to Hammond, told him the facts of the case, and requested a statement as to the *fi. fas.* He gave witness a letter to claimant, upon reading which the latter expressed himself satisfied, and paid the purchase money. There were some other liens on the land, which were settled or paid off out of the purchase money, witness giving orders therefor upon claimant. The balance was then paid to him.

The letter from Hammond to Dobbins was then introduced

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in evidence. It stated that the writer had exclusive control over the *fi. fa.* of Phillips, assignee of Wilson, and another in favor of one Griffith; that the amount of both of these on August 29th, 1869, was \$1,659 88; that, in his judgment, there was more than enough of other property subject and still unexhausted, to settle this demand; that the entire estate of Morrison, trustee, was liable, and should be put between the *fi. fas.* and Dobbins's purchase; and that he would release this land, but for the fact that it would vitiate the lien on other property of defendant in *fi. fa.*

A. M. Perkerson testified that he was deputy sheriff in October, 1872, and the levy of that date was made by him. Is always very careful to give written notice. Does not remember giving notice in this particular case, but is confident, from his usual practice, that he did so.

W. R. Phillips testified as follows: Owns the *fi. fa.* in question. Bought it from John T. Wilson, and paid him the full amount due on the 8th of April, 1867. It was put into the hands of D. F. Hammond, as an attorney, for collection, and no other control of it was given to him. It was to be collected by Hammond, and the proceeds to be applied to the settlement of a claim held by him against witness. He had no authority to release any property from the lien. Knew nothing of the letter to claimant until after it was written, and never assented to it directly or indirectly. Never gave any directions as to the making or dismissing of the levies which appear on the *fi. fa.*

D. F. Hammond testified as follows: Sued to judgment the *fi. fa.* in the name of John T. Wilson. W. R. Phillips bought it and took a transfer. Witness had in his hands a claim against Phillips, and the *fi. fa.* was given to him as collateral security, without any instructions to collect. When the letter to claimant was written, witness thought there was sufficient property still bound for the payment of the *fi. fa.*, without that which claimant wished to purchase. There was a rapid decline in the value of the property, and the amount realized did not meet the demand. The letter was simply an expres-

sion of opinion as to the means attainable for paying off the *fi. fa.* Feeling confident that there was enough without this property, he agreed to exhaust other sources before coming to this. When the first levy was made, claimant came to him and reminded him of the letter. Wishing to keep his promise, witness ordered the levy to be dismissed, and had a levy made on other lands, but it proved unproductive by reason of prior liens. Collection under the *fi. fa.* was not pressed because Phillips was engaged in a suit in which Morrison was an important witness, and he was fearful of giving offense by levying until such suit was settled.

The jury found for the claimant.

Plaintiff moved for a new trial, on the following, among other grounds: Because the court erred in charging the jury, in substance, as follows:

1st. "If you believe, from the evidence, that Hammond was general agent for the management of the *fi. fa.*, so as to have the right of levying on or releasing the land, or that he acted under instructions from plaintiff, or that plaintiff knew and did not disapprove of Hammond's action, and that Hammond intentionally induced claimant to purchase the land, and pay out money therefor, believing that he would not be disturbed by this *fi. fa.*, plaintiff will be estopped from now enforcing it."

2d. "If you believe, from the evidence, that claimant was a *bona fide* purchaser (*i. e.* without collusion, but in good faith and for a valuable consideration) and that he remained in possession four years without disturbance, he was freed from the burden of the lien. A lawful levy, with written notice to tenant in possession, and advertisement of the land, *bona fide*, for the purpose of enforcing the lien and bringing the land to sale, is such disturbance. A mere levy, without written notice, is not. If the levy was not *bona fide* for the purpose of sale, but through forgetfulness of counsel, and he dismissed it upon being reminded of his promise, this does not amount to such disturbance of title as would prevent the lien being lost."

The motion was overruled and plaintiff excepted.

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D. F. & W. R. HAMMOND ; E. N. BROYLES, for plaintiff in error.

B. F. ABBOTT ; JOHN D. CUNNINGHAM, for defendant.

JACKSON, Judge.

1. The main question in this case is whether a purchaser for value, *with actual notice or knowledge of a judgment*, is a *bona fide* purchaser, and within the protection of the four years' possession secured by the Code, section 3583? Upon that question I am requested to deliver the opinion of the majority of the court at the same time that I give my own reasons for dissenting from that opinion and the judgment which necessarily follows it. The majority of the court construe all the statutes in relation to this subject together, and base their opinion mainly upon the idea that the words *bona fide* in the act of 1855-'6, and in the Code, were intended by the law-makers to mean the same thing as the words "*without actual notice of such judgment*," which are the words used in the acts of 1822 and 1852: Cobb's Digest, 437; Acts of 1851-'2, 238; Acts of 1855-'6, 236; Code, section 3583. The words, "for a valuable consideration," appear in all the acts; the words "*bona fide*" are not in the act of 1822 or 1852. The act of 1852 amended the act of 1822 only in respect to time, protecting four years' possession in the same way and to the same extent that seven years' possession was protected by the act of 1822. The act of 1856 leaves out the words "*without actual notice of the judgment*," and inserts "*bona fide*," and the Code follows the act of 1856. Now, my brethren think that the fact that the words "*without actual notice*" are left out of the act of 1856, and the words "*bona fide*" put in, the latter words are put in in lieu of the former, and are intended to convey the same idea, and they say certain provisions of the Code and decisions of this court can be cited to the effect that the terms "*bona fide*" and "*without actual notice*" are equivalent, and mean substan-

tially the same thing. They, therefore, hold that no man can be a *bona fide* purchaser, so as to bring himself within the protection of the Code, in section 3583, who has actual notice of the judgment, and reverse the ruling of the majority of this court in *Sanders vs. McAfee*, 42 *Georgia Reports*, 250.

2. In respect to the letter of the attorney at law, Mr. Hammond, we all think it was not intended to be a release of this property from the lien of the judgment, and if it had been so intended and its words had so imported, the majority of the court are clear that the attorney at law to collect this claim, had no right to release any property from the lien of the judgment without the consent of his client, and that the peculiar facts of this case do not clothe the attorney with any but ordinary powers. In the judgment of a majority of this court, therefore, Mr. Dobbins is protected neither by his four years' possession nor by the paper or letter written to him by Mr. Hammond, the plaintiff's attorney. I differ from my brethren decidedly on the first point, and I think that the transaction between Mr. Dobbins and Mr. Hammond, and the facts of the case, generally, throw great light upon the "*bona fides*" of the purchaser, and make the case as clear as a sun-beam

In the first place, "*bona fide*" in latin means "*good faith*," nothing more, nothing less. The words when anglicised, used in English, common every day parlance, mean precisely the same thing. Hence the dictionary says the word anglicised means "in good faith, without fraud or deception:" Webster's Unabridged Dictionary, 135. This, then, is the ordinary signification of these words, and the Code declares that in construing this statute I shall apply this ordinary signification to these words, unless they are words of art or connected with a particular trade or subject matter: Code, section 4. They are not words of art, they are connected with no trade, the subject matter is the lien of judgments in respect to the purchase of land and its possession. The subject matter being such purchase, and the words applied to the purchaser, I feel bound to apply to them their ordinary signification as

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used in connection with this subject matter. Turning, then, to Bouvier's Law Dictionary, volume I., 211, I find the same definition, to-wit: "good faith, honesty, as distinguished from bad faith." "A purchaser *bona fide*," says the same authority, "is one who actually purchases in good faith," quoting Kent, and numerous authorities.

These words do not mean notice or want of notice. It is true that want of all knowledge of the existence of the judgment would preclude all idea of bad faith in the purchaser to the plaintiff in judgment, of all collusion of any sort with the defendant; but it does not follow that knowledge of the existence of the judgment is proof conclusive of bad faith towards the plaintiff or of collusion with defendant, or of deception of any sort. It may be a circumstance which, when connected with other circumstances, such as getting the land at a less price or letting defendant cultivate a part of it, might show bad faith, but standing by itself it cannot mean bad faith and be conclusive evidence, which nothing can rebut, of such bad faith. The facts of the case at bar are conclusive to my mind of the force of this reasoning. If ever there was a *bona fide*, honest purchaser for value upon earth, Dobbins is one. He bought the property through a real estate agent, Adair; paid full value for it; paid off certain judgments upon it; and hearing that these judgments were outstanding, went to Adair and told him he could pay no more money to go to defendant, Morrison, until these were satisfied, or he got a good title clear of these incumbrances. Adair went to Hammond, who held the judgments as collateral security on a debt Phillips owed Holliday, and on another debt Holliday owed Reynolds. So there were three persons interested in the judgments—Reynolds, Holliday and Phillips. Hammond held them as attorney for all three; said he controlled them exclusively, and wrote the letter embodied in the evidence to Dobbins, at Adair's request, and on the faith of that letter Dobbins paid over the balance of the money to Adair, which otherwise would have been used by him to pay these judgments off. The letter informs him that there is ample

property bound as purchase money for the judgments and besides all the estate of Morrison, as trustee, is so bound, and the only reason the writer would not release the land Dobbins bought, is that, in law, it would release all the other property. Of course Mr. Hammond meant that he would have given a valid release, and got the necessary signatures to it, if his own would not have done, thereby indicating his exclusive control of the *fi. fas.* more fully to Dobbins' mind.

Are not these facts conclusive of good faith in Dobbins? What deception did he use toward anybody? What bad faith? If no bad faith, then his faith was good, and his works show it to be good. Every act of his is the fruit of good faith. There was no deception, no fraud, no collusion, no trickery in what he did. He did not make one cent by it, but was induced by the attorney of the three interested parties to pay the money, the full value of the land, to Adair, when he would have paid it to these judgments. That attorney was the only human being to whom he could have gone for information and direction. He could not have paid the judgment to Phillips for Holliday was interested, nor to Holliday for Reynolds was interested. Nor to Reynolds for the other two were interested. The attorney, Hammond, was the only person with whom he could deal in respect to these judgments because he was attorney for all parties in interest, and he alone represented all and could guard the interests of all.

It is true Hammond did not release the land, but he induced Dobbins to part with his money upon representations which he made. At all events he communicated to Dobbins facts and made representations upon which Dobbins acted, and which show conclusively the good faith of Dobbins toward the plaintiff in *fi. fa.* and the absence of all collusion with the defendant. These facts rebut any presumption which could arise from knowledge of the *fi. fa.*, and show Dobbins to have been an innocent purchaser for value, acting *bona fide*, and holding his honest purchase for four years. It cannot affect the question that Hammond's representations be thought truthful at the time. If they turned out to be false and fruit-

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less, and a third party was damnified who acted on them, the effect is the same; and whose is the fault that they turned out to be false and fruitless? Hammond swears that it was owing to the depreciation of the property consequent upon time, that he failed to make the money out of the other property, and that Phillips, *the plaintiff now pressing this fi. fa.*, would not let him press the collection of the judgment from Morrison, because he had a law suit against Solomon, security for Morrison, of much more importance and value, and Morrison's testimony was important against Solomon in that case, and he must keep friends with him until that case was tried. So that the depreciation of the other property of defendant made it necessary for Hammond to press this judgment on this land, that depreciation was caused by time, and that time was needed by the plaintiff in *fi. fa.* until defendant in *fi. fa.* had testified for him in another case. It does seem to me if there was any deception, collusion, or fraud, it lay somewhere between the plaintiff and defendant in *fi. fa.*, and the claimant, Dobbins, was perfectly innocent of it all. Yet the single fact that he knew the existence of this judgment is made to outweigh all these circumstances which, to my mind, cover his case with equities thicker than shingles or slate cover any house in Atlanta.

I think, therefore, that this case illustrates the propriety of the decision of the majority of this court in *Sanders vs. McAfee*, 42 *Georgia Reports*, 250, and I submit the foregoing additional reasons to those given by Judges LOCHRANE and MCCAY in that case. So far from agreeing that leaving certain words out of a preceding statute and inserting other and different words in a subsequent one on the same subject matter, show that the legislature meant that the new words should convey the same idea with the old words, though different in ordinary parlance and legal signification, I think that fact shows just the opposite; that they intended to change the meaning *because they changed the words*. If they had meant *the same thing* they would have used *the same words*. The fact that such a lawyer as Judge CONE was the author of

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the change made by the act of 1856, strengthens my conviction that the meaning was intentionally changed. In respect to the levy made within the four years' possession, and immediately dismissed, I have to say, that in my judgment it does not amount to a disturbance so as to affect the peaceful possession of four years. It must be pressed, and if not prevented by legal impediments, such as claims or illegalities, kept moving at least, if not pushed to an eviction. Besides, the claimant had no legal notice of the levy. In view of all the reasons I can bring to bear upon the subject, I feel constrained to adhere to the ruling of the majority of this court in the case cited from *42d Georgia Reports*, and to dissent from the majority in the case at bar. I think that to permit this *fi. fa.* to sell Dobbins' land, purchased under these circumstances, and held for four years in peaceable possession, is not only to violate the plain letter of section 3583 of our Code, but to disregard and nullify the spirit and equity of that statute, and to permit covin and deception to overthrow plain dealing, honesty and good faith.

WILLIAM T. TOOLE, plaintiff in error, *vs.* **JOHN B. PERRY**,
defendant in error.

(BLECKLEY, Judge, was providentially prevented from presiding in this case.)

1. That an equitable plea to a common law suit, was, on motion, stricken after the defendant had closed his testimony without having supported it by evidence, is not such an error as authorizes a new trial. Whether the plea set forth a complete defense or not, its dismissal, at that time, did not affect the defendant's case.
2. This court not committed, even by implication, to the position that a common law court has jurisdiction to decree, by the verdict of a jury, an injunction.

New trial. Pleadings. Injunction. Before Judge CLARK.
Sumter Superior Court. October Adjourned Term, 1875.

Reported in the decision.

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W. A. HAWKINS; N. A. SMITH, for plaintiff in error.

GUERRY & SON, for defendant.

WARNER, Chief Justice.

The plaintiff sued the defendant on a promissory note for \$1,938 54, payable to John Williams or bearer, dated 7th June, 1871, and due 1st of July next thereafter. The defendant filed an equitable plea to the plaintiff's action, in which he alleged, in substance, that in the year 1869 he purchased a plantation in Calhoun county, of said Williams for the price of \$15,180 00, and gave to him therefor his two notes, each for the sum of \$7,590 00, one due 1st January, 1870, the other due 1st of January, 1871; defendant paid on the note first due the sum of \$5,000 00, leaving due thereon \$2,590 00; that before the payment of the balance of the money due for said land, Hoyle, assignee of one Baldwin, had filed his bill in the fifth circuit court of the United States against said Baldwin and Williams, alleging that said lands had been purchased by said Williams of said Baldwin to defraud the creditors of Baldwin, and praying that the same might be decreed to be assets in the hands of said assignee to pay the creditors of Baldwin; that at the time the \$5,000 00 was paid, Williams agreed with defendant that he would not demand any further payment of the amount due from defendant for the land until the termination of the litigation in said United States circuit court, and that the said \$5,000 00 was paid upon this agreement, and in consequence thereof that some time after said payment was made said Williams turned over to the plaintiff, Perry, the note on which said payment was made, as collateral security to secure a debt which Williams owed him; that afterwards, at the special instance and request of Perry and Williams, defendant agreed to and did divide the amount due on said note into two sums, and on the 7th June, 1871, gave to Williams his two notes, one for \$1,938 54, due July 1st, 1871, not as a renewal of

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the other note, but for the accommodation of said Perry and Williams; that Perry knew all the conditions and agreements respecting the payment of the \$5,000 00, and that no payment was to be demanded of defendant upon the balance due upon the \$7,590 00 note, and that the note for \$1,938 54 was given by defendant and received by said Williams upon the same terms, and subject to the same agreements and conditions which attached to the balance due on the \$7,590 00 note; that Williams is insolvent, and has no estate with which to answer defendant if he should be compelled to pay said note now sued on by the plaintiff; wherefore, the defendant prayed the court to enjoin the plaintiff from the further prosecution of said suit, and that he may have such relief in the premises as may be considered meet and proper. On the trial of the case, the jury found a verdict in favor of the plaintiff for the full amount of the note sued on.

It appears from the record and bill of exceptions that after the defendant had closed his evidence, (which is set forth in the record) the court, on motion of plaintiff, ordered the defendant's equitable plea to be stricken, on the ground that the defendant had closed without evidence to sustain it, the defendant making no objection as to the time when the motion to dismiss was made. To this order of the court dismissing the plea the defendant excepted.

1. Assuming that the court erred in dismissing the defendant's plea, under the facts and circumstances of the case as set forth in the record and bill of exceptions, how is the defendant hurt by that error? The bill of exceptions states that the defendant's equitable plea was dismissed on the grounds stated in the order. The grounds stated in the order are that the equitable plea was insufficient, and that the defendant had closed his case without evidence to sustain it. The defendant had the benefit of his plea to introduce all the evidence he could to sustain it, and that evidence, as disclosed in the record, did not sustain it, and whilst that may not have been a good legal reason for dismissing the defendant's plea after allowing him to introduce all the evidence he could under it

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nevertheless, it is a good reason why the plaintiff's verdict should not be set aside. The defendant had the full benefit of his equitable plea on the trial of the case, and was allowed to introduce all the evidence he could under it, before it was stricken. The trouble with the defendant at the trial was that he did not have the evidence to sustain his equitable plea so as to prevent the plaintiff from obtaining a verdict upon his evidence. Inasmuch as the defendant was not hurt by the striking of his plea after he had introduced all the evidence he could under it, and that evidence, as disclosed in the record, not being sufficient to defeat the plaintiff's recovery, on his evidence, the verdict should not be set aside for the alleged error in striking the defendant's plea after he had introduced all the evidence he could under it, but which failed to sustain it. There is no pretense or complaint that the verdict is contrary to the evidence or without evidence to support it. The only complaint is that the court erred in striking the defendant's equitable plea under the facts and circumstances as set forth in the record.

2. We are not to be considered as holding in this case, even by implication, that a common law court in this state has jurisdiction to decree, by the verdict of a jury, a temporary injunction as prayed for in the defendant's equitable plea. As the defendant in error did not claim damages for delay in bringing the case up to this court, we do not award any.

Let the judgment of the court below be affirmed.

JOHN MINOR, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

1. When there was no evidence that the prisoner instructed another when and how to steal, it was error to charge that so doing, with other enumerated acts, would render him a principal in the larceny.
2. Open and public use of stolen property, and a truthful answer as to how some of it was disposed of, while *prima facie* evidence of innocence, may be intended to disguise guilt, and it is not error to submit the true construction of such conduct to the jury, in the light of all the evidence.

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3. When, without any reason apparent from the record, the *corpus delicti* is less fully established than might be expected, this court will the more readily grant a new trial for error in the charge of the court.

Criminal law. Charge of Court. New trial. Before Judge WRIGHT. Dougherty Superior Court. April Term, 1876.

John Minor was indicted for the crime of simple larceny, the particular act being the stealing of a cow, the property of one Louisa George.

On the trial, the evidence made, in brief, the following case :

Prisoner owned a butcher pen, having as his partner one Israel Telfair. The cow was seen standing in their lot. Israel sent word to prisoner, who was not at the pen, that "he had got the cow," and for him to come out there, which he did. The cow was carried into the slaughter house and butchered by prisoner and others. It was then placed in a wagon, taken to the store of one deGraffenreid, and sold to him. A demand was made by one of the party (Wesley Wright) for pay; said deGraffenreid replied that he had made no contract with him; Wesley brought back prisoner, who had gone across the street, and the latter said, "pay this man for beef, \$7 50," which was accordingly done. Beeves frequently sold for no more than that amount.

The evidence was conflicting as to who drove the cow into the butcher lot or pen; but none of the witnesses swore prisoner did so.

One witness (deGraffenreid) testified that on the morning of the day the cow was brought to his store, prisoner told witness that he had engaged a beef.

Another witness (Stephen George) testified that one of the horns was brought to his house by Louisa George, and was recognized by its peculiar shape and being sawed off; that he met prisoner on the street, and asked him what he (prisoner) had done with the hide of the cow he had killed, and prisoner stated he had sold it to a Mr. Meyer; that witness went to Meyer's store, and there found the hide, which was identified as that of the stolen animal.

The jury found a verdict of guilty.

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Defendant moved for a new trial on the following grounds:

1st. Because the verdict was against the law and the evidence, and without evidence to support it.

2d. Because the court, after giving in charge the definition of principals in crimes as defined in the Code, erred in charging as follows: "If you believe from the evidence in the case, that prisoner was one of the original parties in scheming and planning the offense named in the indictment, under the law I have just read you, by furnishing the brain-work, and participating in the affair by physical action after the cow was driven up, (if the evidence shows she had been driven up,) then he would be a principal in the first degree, and not a principal in the second degree, or accessory before or after the fact. For instance, if he planned or instructed another when and how to steal the cow and bring it to him, and then when the cow was thus taken and brought to him, he and those bringing her, killed and appropriated her to their own use, and did such acts as convince you that he was one of the original schemers, planners and participators in the theft, though he may not have been actually present when the cow was driven up," etc.

3d. Because the court, after charging that prisoner's want of concealment and open dealing and truthful statements could be taken into consideration by the jury, erred in charging as follows: "But if you believe, taking this with all the evidence in the case, that he did so to cover his guilt and make the public believe he had purchased the cow from another, you can give it weight for or against him; but the most natural or probable construction to place upon such acts is that they are evidence of innocence."

The motion was overruled, and defendant excepted.

D. H. POPE, for plaintiff in error.

B. B. BOWER, solicitor general, for the state.

BLECKLEY, Judge.

1. It seems, from authority, that to complete a larceny by A, there may be, by a sort of criminal accretion, another complete larceny by B: 25 *Georgia Reports*, 515; also, that a man may commit a crime as principal without being present: 30 *Ibid.*, 757. Compare 26 *Ibid.*, 493; Code, sections 4305 to 4308; 17 *Georgia Reports*, 346; Roscoe's Cr. Ev., 871, 872, 873. There is matter for much thought in these things, and mystery enough to bewilder one for some days. The Code seems plain; but the same law existed when the 25th *Georgia* and 30th *Georgia Reports* were made. For my own part, judicial candor obliges me to say that I do not know whether the main staple of Judge Wright's charge in the present case, about scheming, planning and furnishing brain-work, is good law or not. I am not sufficiently master of the subject to overrule him, and yet I secretly wish he would not charge the like again. It is some little relief to my perplexity to find that the charge is unguarded in that part of it which refers to the prisoner as possibly instructing another when and how to steal. There is certainly no evidence to warrant that part of the charge; and on that account, all the members of the court concur in pronouncing it erroneous.

2. There was no error in calling the jury's attention to a possible guilty motive for the open dealing and truthful answer of the prisoner. Men hide under light as well as under darkness. Vice assumes the frank demeanor of virtue. To do right, or seem to do right, after doing wrong, is often the best means of shunning detection. Still, the natural and probable indications from open conduct and truthful speech are favorable to innocence; and so, in effect, the judge stated to the jury.

3. That we direct a new trial without discovering a more grave error in the charge of the court than the one which I have pointed out, may seem to argue that we are not altogether satisfied with the verdict, on the score of evidence. And it is true, we are not. There is not that full proof of the corpus

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delicti which the circumstances would lead a thoughtful mind to expect. It is a fact, and an unexplained fact, that the owner of the cow was not called to testify. For aught that appears, she may have sold the animal, or given her consent to having her butchered. Who the witness was bearing the owner's family name, or whether related to the owner or not, is not shown. What concern this witness had with the cow does not appear. The cow may have been lost, as to him, but not as to the owner. Why was not the owner examined or the omission accounted for? Or, if neither, why was not some custody or care of the cow brought home to this or some other witness? Again, the witness above referred to testified that the owner brought the horn or horns of the cow to his house. Here we have the owner in possession of one or both of the horns. Where and from whom did she get them? There is no hint that she treated the cow as stolen, or was not satisfied with the way the animal was disposed of, or with the way she herself got the horns. Possibly a few truthful words from her lips would clear up this whole matter.

We think there should be a new trial; and, in view of the evidence in the record, an indictment with more than one count in it would be much safer than the present one, which has but a single count.

Judgment reversed.

JAMES HUNTER, sheriff, plaintiff in error, vs. WILLIAM R. PHILLIPS, defendant in error.

(BLECKLEY, Judge, having been of counsel, did not preside in this case.)

1. To enable the plaintiff to recover against a sheriff for neglecting or refusing to levy, by *rule*, two things must appear; 1st. That the sheriff is in contempt of the court; 2d. That by that contempt the plaintiff was injured.
2. The sheriff is bound by official duty to execute with diligence the final process of the court, and when directed by plaintiff's attorney to levy upon defendant's land for June sales, and at the instance of defendant, to enable the latter to get time to procure an injunction, he fails to make the levy for

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June, but postpones to July sales, he is in contempt of court so as to make him subject to rule by plaintiff, if it appear that plaintiff has been injured by the postponement.

3. Where the injunction was procured in time to arrest the sale of the land in July, the presumption that the plaintiff has been injured by the illegal conduct of the sheriff is rebutted by the presumption that the court of chancery did right in granting the injunction, and until the injunction cause be finally tried and determined, it cannot satisfactorily appear whether the plaintiff was injured or not by the failure to levy for one month. If the injunction be made perpetual, he will not have been injured; if it be not made perpetual, he will have been injured by the necessity of employing counsel and the delay in getting his money, and perhaps the depreciation of the property. The rule should not be made absolute *now*, therefore, but following the decision in *Hackett vs. Green*, 32 Georgia Reports, 512, it should be kept open until the final disposition of the injunction case.

Sheriff. Levy and sale. Rule. Injunction. Before Judge HOPKINS. DeKalb Superior Court. September Adjourned Term, 1875.

Reported in the opinion.

CANDLER & THOMSON; MCKAY & TRIPPE, for plaintiff in error.

L. J. WINN, for defendant.

JACKSON, Judge.

The attorney at law of Phillips directed the sheriff to levy on the lands of defendant in *fi. fa.* for June sales. The sheriff met the defendant, John B. Gordon, and was requested by him not to levy until time for July sales, so that he might have time to sue out an injunction. Accordingly the sheriff did not levy for June but for July, and on the 30th of June he was enjoined from selling, and the injunction cause is still pending. At the next term of the superior court, it being the return term of the writ of *fi. fa.*, the plaintiff in *fi. fa.* ruled the sheriff for the amount of the execution; the sheriff answered the foregoing facts, and also that several sale days intervened between July and the return

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term of the writ. The court made the rule absolute, and this is the error complained of.

1. In the earlier decisions of this court it seems to have been held that if the sheriff did not strictly discharge his duty when the process of the court was in his hands, he was liable to be ruled by the plaintiff, whether the plaintiff was injured or not by the illegal conduct of the sheriff. Such is the effect of the decision in *Wood's case*, 7 *Georgia Reports*, 448, and in *Seal vs. Price*, 11 *Ibid.*, 297. But the more recent decisions of the court are to the point that two things are necessary to enable the plaintiff in *fi. fa.* to recover from the sheriff by rule: First, illegal conduct amounting to contempt of the court; and, second, injury to the plaintiff. Without citing other cases, it is enough to refer to *Cowart vs. Dunbar*, 56th *Georgia Reports* 417. The statute clearly sustains that decision. It authorizes the rule "whenever it appears that such sheriff has injured such party" by neglecting to levy on his property: Code, section 3949. Unless some injury to the party applying for the rule appear, it would seem clear that such party had no standing in court. The court could punish his officer if he pleased by fine for contempt, but what business had the plaintiff with that power of the court unless he was injured. Sense sustains the statute and the statute sustains the latter decisions of the court.

2. 3. In this case we think that the sheriff clearly neglected or rather refused to do his duty. When directed by the plaintiff's counsel to levy for a certain sale day, it was his duty to do so. The plaintiff has the right to control the *fi. fa.*; if the sheriff were directed by the plaintiff's counsel not to levy, it would be a good answer to a rule against him, though the plaintiff lost every dollar of the *fi. fa.* by the sheriff's not levying. It is a bad rule that does not work both ways. If, when directed to levy, he does not, and thereby the plaintiff loses anything, the sheriff ought to pay it. We think, therefore, that the plaintiff here has made out a good case against the sheriff, so far as contempt of court in not discharging his duty in respect to its process, is concerned; it being our opinion that

whenever the sheriff is directed by plaintiff's counsel to levy, and he fails to do it, he has been put upon diligence by instructions; he is bound to obey, and refusing to obey, he is in contempt of court, unless he shows some legal reason for not carrying out the instructions. And we think, too, that delaying to levy, to give time to defendant at his request to enjoin him, is anything but a legal reason for not obeying the instructions of the plaintiff.

This court has held, and we fully approve its ruling, that any semblance of collusion with defendants by sheriffs will not be tolerated, and anything of the sort is contempt of the court with whose process the sheriff thus tampers. If, therefore, it appeared that the plaintiff had been injured, the rule ought to have been made absolute. Does that appear? Whenever the sheriff is in contempt by failing to levy, the presumption is that the plaintiff has been injured; but that presumption may be rebutted. In this case we think it rebutted by the fact that the injunction was granted by the superior court and is still pending therein. The plaintiff may be injured, if that injunction case is decided adversely to the defendant in *fi. fa.*, but the injunction having been granted by the court, the presumption is that the court did so upon good cause and supported by evidence, or the bill would have been answered and the injunction dissolved. We hold, therefore, that the presumption of injury to the plaintiff is rebutted by the grant of the injunction, and that it does not yet appear that the plaintiff has been injured. It did not appear when the rule was made absolute. Until it did appear presumptively or otherwise, the rule should not have been absolute.

Whether the plaintiff has been injured by the illegal conduct of the sheriff must turn upon the event of the trial of that injunction case. If that be not decided in favor of the plaintiff here, if he be perpetually enjoined from selling the lands of defendant in *fi. fa.*, then he will not have been injured; but if he has been enjoined improperly, then he has been delayed and kept out of his money by the bad conduct of the sheriff; he has been forced to employ counsel to defend

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an unjust bill ; the defendant's property may have depreciated so as not to bring the debt, and he may have been thereby injured. In the case of *Hackett vs. Green*, 32 *Georgia Reports*, 512, under circumstances and facts very similar to this case, where a claim to a negro had been interposed after the sheriff had incurred liability by failing to sell the negro, this court directed the rule against the sheriff to be kept open until it was ascertained whether or not, and how much, the plaintiff was injured by the illegal conduct of the sheriff. We shall follow the lead of that case, and reversing the judgment making the rule absolute, we direct that the court below hold the rule *nisi* in this case open to await the final decision of the injunction cause.

Judgment reversed.

ELLA S. HINES, administratrix, plaintiff in error, vs. EPHRIAM H. POOLE, defendant in error.

(BLACKLEY, Judge, was providentially prevented from presiding in this case.)

1. Where a person is employed as a general agent to transact business for an administratrix, and afterwards dies, his sayings, in connection with such agency, are admissible to bind the estate.
2. Where one party to a contract is dead, the other is a competent witness to show that the consideration thereof inured to the benefit of the estate of the deceased after his death.

Administrators and executors. Principal and agent. Evidence. Witness. Before Judge WRIGHT. Decatur Superior Court. November Adjourned Term, 1875.

The following, taken in connection with the decision, presents the facts of this case :

E. R. Peabody testified that C. C. King, the father of Mrs. Hines, had been her general agent for the management of the estate of her intestate, D. P. Hines ; that he stated to witness that the Hodgkiss' Scott & Company claim had been arranged

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by Mrs. Hines giving her note, as administratrix, for the amount; that said King was now dead; that the consideration of the debt was merchandise, most of which was sold after the death of intestate, and the proceeds turned over to his administratrix or her agent.

T. H. Hodgkiss testified that the note was taken in settlement of an account for goods; that many of the articles were on hand at the time of intestate's death, and were in the possession of his administratrix; that the consideration of the debt inured to the benefit of intestate's estate; that witness was senior member of the firm of Hodgkiss, Scott & Company, the payees of the note; that he has no pecuniary interest in this suit, the note having been transferred to Poole.

FLEMING & RUTHERFORD; GURLEY & RUSSELL, for plaintiff in error.

WHITELEY & DONALDSON, by Z. D. HARRISON, for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiff against the defendant, on a promissory note signed by the defendant, as administratrix on the estate of D. P. Hines, with an averment that said note was given in payment of an account due by the intestate and for the benefit of his estate. On the trial of the case, the jury, under the charge of the court, found a verdict in favor of the plaintiff for the sum of \$566 46, principal, with interest. The defendant made a motion for a new trial on various grounds, which was overruled by the court, and the defendant excepted.

Many of the questions made by the plaintiff in error, were settled when this case was before this court on a former occasion: See 52 *Georgia Reports*, 500.

1. There was no error in admitting the evidence of Peabody as to the sayings of King, the defendant's general agent in the management of her intestate's estate, the agent, King, being dead.

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2. There was no error in admitting the evidence of Hodgkiss, as against the defendant, because her intestate was dead; the witness was only offered to prove that the account for which the note was given inured to the benefit of the estate, and not to prove any contract made with the intestate. In view of the evidence contained in the record, there was no error in the charge of the court to the jury, or in refusing to charge as requested.

Let the judgment of the court below, overruling the motion for a new trial, be affirmed.

B. H. GAUDY, trustee, plaintiff in error, *vs.* **FLOYD L. BABBITT** *et al.*, administrators, defendants in error.

1. When a trustee, as such, has given his promissory note for the debt, and the note is declared upon, the same is admissible in evidence.
2. But the note itself is not sufficient to warrant a recovery against the trust estate. The plaintiff must go further and establish his whole declaration, proving the existence of a trust estate, of what it consists, and the specific facts which render it liable for the debt. This he must do if there be no plea but the general issue, or even if there be no plea at all.

Trusts. Evidence. Before Judge WRIGHT. Decatur Superior Court. November Adjourned Term, 1875.

Babbitt and Touge, as administrators of S. Davis Touge, deceased, brought complaint against Gaudy, as trustee for Mary Gaudy, upon the following note:

"\$90 00.

"BAINBRIDGE, May 8th, 1867.

"On or before the first of December next I promise to pay to the order of S. Davis Touge \$90 00, for value received.

(Signed)

"B. H. ^{his} X GAUDY, trustee."
mark.

The declaration was, in substance, as follows: Your petitioners aver that said note was given by the said Gaudy, as trustee for Mary Gaudy, for a bill of cotton yarns for the use of said *cestui que trust* and family, and for certain cash paid by the payee to Belcher & Terrill, for goods purchased

for the use of said *cestui que trust* and family, and at the special request of such trustee, etc.; that all of the aforesaid indebtedness was credited for the special benefit of the aforesaid *cestui que trust* and her trust estate, consisting of lots of land (enumerating them) which were controlled by the said trustee, and operated by him at the time, in the production of cotton, corn, and other agricultural products, for the sole use and benefit of the said *cestui que trust* and family.

To the declaration were attached a copy of the note, and an itemized account upon which it was alleged to have been based.

The defendant pleaded the general issue and the absence of authority in him to sign the note.

No evidence was introduced beyond the note and the testimony of Touge, to the effect that the note was given for yarns bought by defendant for his wife, from the intestate; that the note was in the handwriting of the intestate; that the defendant was the trustee for his wife, Mary Gaudy.

The jury found for the plaintiffs the amount sued for, to be recovered out of lots of land (specifying those enumerated in the declaration). The defendant moved for a new trial upon the following grounds, to-wit:

1st. Because the verdict was contrary to law and evidence.

2d. Because the court erred in charging the jury that if the plaintiffs had alleged in their declaration the consideration of the note sued on, that it was for necessities for the trust estate, that a trust estate existed, of which defendant was the trustee, and of what it consisted, and these allegations were not denied by other pleas than were filed in this case, then they need not be supported by any proof; that the fact that they were not so denied amounted to an admission of them.

3d. Because the court erred in admitting the note sued on in evidence over the objection of defendant.

The motion was overruled and the defendant excepted.

BROWN & CRAWFORD, for plaintiff in error.

No appearance for defendants.

BLECKLEY, Judge.

1. The general rule stated in 1 Parsons on Contracts, 121, and in Story on Bills, sections 74, 75, that a trustee cannot bind the trust by executing a note, has not been relaxed in this state as to executors, administrators or guardians: 39 *Georgia Reports*, 130; *McFarlin vs. Stinson*, 56th *Ibid.*, 396. But in 25 *Georgia Reports*, 140, a distinction is taken, as to the ordinary trustees, which ought to be maintained. On principle, it is difficult to say why a trustee who can contract a debt at all, cannot do so by note. Why should there be a capacity to make a verbal promise and not a written one? It is, however, not necessary to search for principle when we have a decided case which is both authoritative and satisfactory. The note before us is not so explicit as that recited in the case to which we refer; but it is signed by Gaudy, with the addition of trustee to his name, and is declared upon as made in his representative character; and there is no denial of its execution, though the authority to execute it as trustee is denied. The sworn plea which presents this point is, in effect, a mere demurrer. We think the note was admissible in evidence, and so rule.

2. But it fell far short of making out the plaintiffs' case. And the parol evidence superadded was only to the effect that Gaudy was trustee for Mrs. Gaudy, and that the note was given for yarns bought by him for her. The terms of the trust were not shown, so as to disclose to the court and jury what were its scope and purpose; who, if any, besides Mrs. Gaudy, were the beneficiaries, or what, if any, restrictions were imposed on the trustee's power. Neither did it appear of what the trust estate consisted, or what was its value, or whether it yielded an income, or whether encroachment upon the *corpus* would be necessary or proper. Neither did the condition in life, the circumstances or the wants of Mrs. Gaudy appear. While, under section 3377 of the Code, a claim against a trust estate may be enforced at law, the plaintiff, by his pleadings and proof, must make a case in which a

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court of equity would administer the relief prayed for. To do this where supplies are furnished for the beneficiary, the plaintiff must go much further than the proof went in this case. If any plea were necessary to impose this burden, the general issue, which was in on oath, would be quite sufficient: See 54 *Georgia Reports*, 117. But to establish his equity is a part of the plaintiff's case, and he must adduce full and satisfactory evidence on every material point, even where there is no plea whatever. The court erred in charging the jury that allegations in the declaration not specially denied, need not be proved. And the evidence was insufficient to warrant the verdict.

Judgment reversed.

HENRY IRBY, plaintiff in error, vs. NATHANIEL E. GARDNER, defendant in error.

(BLECKLEY, Judge, having been of counsel, did not preside.)

1. A sheriff's deed, duly recorded, should be admitted in evidence, without the justice court *fi. fa.* under which the land was sold, the sale having been made in 1855, and the *fi. fa.* lost.
2. Whether the deed, when admitted, covers the land in dispute or not, is a question for the jury; and if the deed, on its face, covers a lot that has not and never had any existence, and proof is made by a party to the *fi. fa.* described in the deed, and who controlled it, that defendant in *fi. fa.* was in possession of and pointed out the lot in dispute, and he went with the constable upon the lot in dispute to levy on it, the constable being dead and the sale made in 1855, the evidence of mistake either in the entry of the levy, or the deed, or both, is sufficient to carry the case to the jury, and a non-suit should not have been granted.

Evidence. Deeds. Levy and sale. Before Judge HOPKINS. Fulton Superior Court. October Term, 1875.

Reported in the opinion.

WILLIAM EZZARD; JOHN COLLIER, for plaintiff in error.

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A. W. HAMMOND & SON, for defendant.

JACKSON, Judge.

Irby sued Gardner for lot number eighty-nine, on Calhoun street, in Atlanta, setting out in the declaration a deed from sheriff Smith, made in 1855, in which, by mistake, the deed was made for lot eighty-nine, on Collins street. The deed recited that the sale was under a justice court *fi. fa.* in favor of B. Thurmond against Lewis J. Parr and T. G. W. Creswell. The constable who made the levy was dead and the *fi. fa.* was lost; diligent search had been made for it, and it could not be found. Creswell swore that the lot eighty-nine, on Calhoun street, was pointed out by Parr, his co-defendant, he controlling the *fi. fa.*, to be levied by the constable; that the constable went on the land to levy, but he did not see him write the levy on the *fi. fa.* It was proven that no lot number eighty-nine, was on Collins street at all, and a map of the city was introduced which showed that fact, and that between eighty-nine on Calhoun and the opposite lot on Collins, but one lot intervened. The sheriff could remember nothing about it, but, aided by the deed, testified that he followed the levy. Other witnesses were sworn, to the effect that there was no such lot as number eighty-nine on Collins street. On this evidence the court rejected the deed and non-suited the plaintiff; the plaintiff excepted, and the questions are, were the rejection of the deed and the grant of the non-suit right?

1. We think that the evidence of the loss of the justice court *fi. fa.* was abundant. Search had been made for it in the sheriff's office, the justice's court office, and elsewhere, where it might possibly have been found. The deed had been recorded, it was therefore proven, and the *fi. fa.* being satisfactorily shown to have been lost, the deed ought to have been admitted to go the jury for what it was worth.

2. The deed then being admitted in evidence, the question was, did it cover number eighty-nine on Calhoun street, and the answer to that question hinged on the point, whether the

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sheriff sold and the plaintiff bought that lot, and by mistake the deed was made to a lot that had no existence. The deed cannot cover number eighty-nine on Collins street, because there is not, and never was, such a lot. It is impossible that the sheriff sold a thing that did not exist. What lot does this deed then cover? That is a question for the jury. This deed shows that the sheriff sold some lot under a certain *fi. fa.* A party to that *fi. fa.*, then controlling it, swears that Parr pointed out number eighty-nine on Calhoun street; that Parr was then in possession of that lot; that he, the witness, went with the constable to this number eighty-nine on Calhoun, to levy, and while he does not know what the constable wrote on the *fi. fa.*, he went on the identical lot to levy on it. It seems, then, that some mistake was made either in entering the levy or describing the land in the deed, or both; and we think these facts sufficient, under the ruling in *Summerlin vs. Hesterly*, 20 *Georgia Reports*, 689, to carry the case to the jury, and that the Court erred in non-suiting the plaintiff. If the defendant knew nothing of all these facts and mistakes, and bought without notice, whether the plaintiff can recover the land is another question, and as it requires strong evidence to show such a mistake, and that such a deed covers this lot, whether they will believe that it does cover it, is also another question. We simply rule that the evidence is sufficient to allow the jury to pass upon the case, and not so weak as to have authorized the court to withdraw it from them.

Judgment reversed.

THE GEORGIA RAILROAD AND BANKING COMPANY, plaintiff in error, *vs.* CHARLES J. RHODES, defendant in error.

1. Where a baggage-master upon a train, in imminent danger of collision, jumps therefrom, it is no defense to an action for injuries sustained, that the conductor ordered him not to jump. When a collision is inevitable, such action becomes one of reasonable precaution.

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2. Such an employee assumes the risks necessarily incident to his occupation, but not such as result from the negligence of his co-employees.
3. Every employee of a railroad will not be presumed to know the schedule, but only such as are directly concerned in the running of trains.
4. When such an employee is shown to have received injuries resulting from gross negligence on the part of his co-employees, this court will not readily interfere with the verdict of the jury.

Railroads. Damages. Negligence. Presumption. Verdict. Before Judge HOPKINS. DeKalb Superior Court. September Adjourned Term, 1875.

Reported in the decision.

HILLYER & BROTHER; CANDLER & THOMSON, for plaintiff in error.

JOHN A. STEPHENS; L. J. GLENN & SON, for defendant.

WARNER, Chief Justice.

The plaintiff brought his action against the defendant to recover damages for injury sustained by the alleged negligence and carelessness of the defendant's agents in running its railway trains on its road. On the trial of the case, the jury, under the charge of the court, found a verdict in favor of the plaintiff for the sum of \$6,000 00. The defendant made a motion for a new trial on the several grounds alleged therein, which was overruled by the court, and the defendant excepted.

It appears from the evidence in the record that the plaintiff was in the employ of the defendant as baggage master, and was on board of its train performing his duties in that capacity at the time of the alleged injury. The injury of plaintiff was caused by a collision of two passenger trains on the defendant's road, in consequence of its schedule being ambiguous, or because its agents did not understand it so as to regulate the running of its trains by it, to prevent a collision thereof. The plaintiff being in the baggage car, and seeing that the two trains were not more than sixty to one hundred

yards apart, and that a collision was inevitable, jumped out of the car and broke his ankle badly, so as to render him a cripple for life. There is evidence in the record that Smith, the conductor, told the plaintiff not to jump, but the plaintiff states that he did not hear him; that there was a passenger in the baggage car who remained there and was not hurt. The grounds for a new trial insisted on here were, that the verdict was contrary to law and the evidence, and was excessive. Because the court refused to give in charge the following requests: First. "That if it appear that at the time of the injury the plaintiff was acting in disobedience of a proper order of the conductor or person in charge of the train, to secure his, plaintiff's, safety, and it also appear that the injury was caused by such disobedience, he cannot recover." Second. "That an employee on a railroad train, serving for wages, takes upon himself the risks and dangers necessarily incident to the service; amongst these is the risk of his own mistakes or blunders." Third. "If the rules and schedules of a railroad company, calculated and provided for the purpose of running the trains with safety and avoiding collisions, be defective or ambiguous, and an employee knows the rules, or has ample opportunity to know them to such an extent as will authorize the authorities of the road to presume that he does know them, and he continues in the service of the company, and makes no complaint, or endeavors to have the defect remedied, he may be deemed to have waived his right, and he is barred from claiming damages for an injury suffered by him in consequence of such defect."

1. There was no error in the refusal of the court to give the first request in charge to the jury. This request assumed the law to be that the conductor had the right to order the plaintiff, as baggage master on the train, in case of a collision of the two trains, by the negligence of defendant's agent, to remain in the baggage car and take his chances of being killed. The only orders of the conductor which the plaintiff, as baggage master, was legally bound to obey, were such as appertained to his duties as baggage master, and not such as apper-

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tained to the protection of his own life when the two trains were about to collide.

2. There was no error in refusing the second request to charge the jury. The plaintiff, an employee as baggage master on the defendant's train, took upon himself the risks and dangers necessarily incident to his employment in that capacity when the other agents of the defendant, his co-employees, performed their duty, but he did not take upon himself the risk and danger of being killed by the collision of the defendant's trains in consequence of the negligence of its agents.

3. There was no error in refusing the third request set forth in the record. The plaintiff, as baggage master, was not presumed to know whether the rules and schedule provided for the running of the defendant's trains on its road, were defective, or ambiguous, inasmuch as it was not his business to run the defendant's trains, or either of them; that duty devolved upon the conductor and engineer of the defendant's respective trains. The plaintiff was not at fault in jumping from the train, under the circumstances as shown by the evidence in the record, it was an act of reasonable precaution to protect himself from danger when he saw that the collision of the two trains was inevitable, although he might not have been injured if he had remained in the car, but the plaintiff could not have foreseen that.

4. There is sufficient evidence in the record to sustain the verdict of the jury, which is not excessive under that evidence. The collision of the defendant's trains, by which the plaintiff was injured, was caused by the gross negligence of its agents, and when that is the case, this court will not readily interfere with the verdict of the jury.

Let the judgment of the court below be affirmed.

JANE GRIMES *et al.*, plaintiffs in error, vs. THOMAS J. LITTLE, trustee, *et al.*, defendants in error.

1. When two trustees deal with each other, both believing that authority exists for one to purchase from the other a full tract of land, when the authority really extends only to part of the tract, the trust estates will be tenants in common in equity; the vendee owning, when paid for, all that could be legally purchased, and the vendor the balance, it being unpaid for. After the land has greatly depreciated, partition, and not rescission, is the remedy for adjusting equities between the parties.
2. When a party collaterally interested is brought in as one of the defendants to a bill for adjusting such equities, and he, answering the bill, prays equity in his own behalf, and the facts make his equity against a co-defendant apparent, the decree should settle his rights as well as those to the original transaction.
3. In decreeing a partition the chancellor should not assume that the average value per acre of the whole tract will hold as to each acre or a given number of acres separately; the land should be divided by metes and bounds according to actual, and not average value; or if that cannot be done, it should be sold and the proceeds divided.
4. Such amendments of the pleadings may be made as will enable all the parties to reach that equitable relief to which they are severally entitled.

Trust. Equity. Partition. Before Judge POTTLE. Hancock Superior Court. October Adjourned Term, 1875.

Reported in the opinion.

GEORGE F. PIERCE, JR.; J. T. JORDAN, for plaintiffs in error.

C. W. DuBOSE, by SEABORN REESE, for defendants.

JACKSON, Judge.

This was a bill filed by Grimes and others, consisting of a family of children, being *cestui que trusts*, against Little, their trustee, and Lamar, trustee for his children, and Simmons, the purchaser of a judgment against the trust estate of the Grimes family.

The facts are that the Grimes owned a plantation in Washington county which they desired to sell and reinvest the pro-

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ceeds in Hapcock. Accordingly, Worthen, the predecessor of Little, as trustee for them, applied to the chancellor exercising jurisdiction in Washington county, for leave to sell and reinvest, which was granted to Little, his successor, the present defendant, "to sell at private sale and to reinvest the proceeds, or so much thereof as may be necessary, in some other suitable farm or homestead, for the family." The Washington county place was accordingly sold for \$4,200 00, and the plantation of the Lamars, in Hancock, was bought at the price of \$5,500 00, or some such sum. Little paid some \$4,000 00 in cash, or in subsequent payments, the proceeds of the Washington place, expecting the profits of the place to pay the balance, but those profits were never realized. Lamar gave Little bond for titles, to be made when the note was paid. The note not being paid, Lamar brought suit upon it, and recovered judgment against Little, as trustee, and assigned the judgment to Simmons for some \$1,700 00 in cash. Simmons levied upon the Grimes' Hancock purchase, of which they had been in possession for some years, whereupon the Grimes filed this bill against Little, their trustee, Lamar, trustee for his children, from whom the Hancock place was bought, and Simmons, who purchased the judgment and had the *fi. fa.* levied, praying that the judgment be enjoined perpetually, that the whole trade be rescinded, that the Lamars take back their land and pay the money paid for it to complainants, and if they could not pay, that the land be sold and the proceeds applied first, to the payment of their money back to them, and adding a prayer for general relief.

It was then agreed that whole case be submitted to the chancellor, without a jury, to settle all equities between the parties.

The chancellor decreed that two hundred and twenty-seven acres of the whole tract, six hundred and twenty-seven, be carved off by five commissioners named by him, to be sold to pay the *fi. fa.*, and that the Grimes retain the remaining four hundred acres. The Grimes have excepted to this decree, and bring the case here for our review.

It is perfectly clear, as the court below held, that the trustee, Little, had no right to go beyond the chancellor's order to reinvest the proceeds, or such part as was necessary to purchase a new home. His promise to pay more was, therefore, without authority, and could not bind the Grimes' trust estate. On the other hand, the Grimes have no right to the entire body of the land, for their money never paid for it. So far we agree with the reasoning of the court precedent to his decree; but we cannot agree with the remedy furnished in that decree. It assumes that all the land is worth the same sum per acre, and estimating it at \$8 50, he directs a certain number of acres to be cut off to pay the unpaid judgment, and as the houses are left with the Grimes, he directs another one hundred acres to be carved off to pay for the Lamar share of the houses. The decree seems to us to be arbitrary, nor does it settle the whole case. What is the true *status* of the Grimes and the Lamars in respect to this land under the facts of this case? We think they are tenants in common thereof, and probably that was the idea in the mind of the court below. Equitably they must be tenants in common. It would be unjust to the Lamars to rescind the sale. Property of all sorts has shrunk in value since the sale. The whole land would not bring the money actually paid, and though, perhaps, too much was contracted to be paid at first, yet the bargain was not unconscientious; both trustees appear to have acted fairly, and both families were well satisfied, and had not the price of lands greatly fallen, and hard times come upon us all, in all probability this litigation would not have arisen. The purchase was good and valid as far as the money went. It paid for some of the land, not for all. For that part which the trustee, Little, could, under his authority from the chancellor, buy and pay for out of the proceeds of the Washington place, the Grimes are entitled to have and hold title and possession, and titles to that part should be executed by Lamar to them, or their trustee, because that contract was legal and they have paid for it. To that part which they have not paid for, Lamar, trustee for his children, should re-

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tain the title. Now, what are these respective parts of this tenancy in common, and how shall they be ascertained? The law points out the mode, and that is by partition in equity: Code, sections 3183, 3184, 3185. By reference to these sections it will be seen that equity has jurisdiction for partition in just such a case as this, for there are peculiar circumstances here which render this proceeding in equity suitable and just. The decree can be moulded "to meet the general justice and equity of each person entitled," says section 3185, and this is absolutely necessary in this very peculiar case. If it be said that the bill does not ask for a partition of these lands, the reply is, it prays for general relief, and the distinct relief prayed for would be anything but equitable, in our view. Besides, the several defendants answer and pray judgment and justice in their behalf. And as the complainants invoke the aid of equity, they must be ready to do equity and to submit to its behests. In view of the entire case and all the circumstances surrounding it, and the parties and their several equities, we conclude to reverse the decree rendered by the chancellor, and to send the case back with the following instructions:

1st. Let the pleadings be amended, if deemed necessary, so as to reach the proposed remedies.

2d. Let the judgment of the assignee, Simmons, and the execution be forever enjoined, and treating his (Simmons') answer as a cross-bill against his co-defendant, Lamar, let a decree be entered on that cross-bill against Lamar, as trustee, for the amount of money actually paid for the debt enjoined, with interest from its payment, and let him have a lien upon the Lamar share of the plantation in the possession of the Grimes.

3d. Let the bond for titles held by complainants be surrendered, and a deed made to them or their trustee for their share of the land, say forty-two fifty-fifths (42-55,) or whatever part it be found exactly to be, and let Lamar retain title to the balance for his children.

4th. Let the land then be partitioned in the mode usual in

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equity, either by metes and bounds, or by sale, as may be found most equitable and just to all parties, assigning the complainants forty two fifty-fiths, or whatever may be found to be their precise share of the whole, and applying the balance, when converted into money, to the recovery on the answer in the nature of a cross-bill of the defendant, Simmons, and the surplus, if any, to Lamar.

As the trustees on both sides seem to have acted in perfect good faith, and with and by the consent of the senior members of both families, we do not think that they, or either of them, should be held personally liable for any default.

The case is anomalous, *sui generis*, involving double trusts, two sets of children, equities all around, and while we may not have reached conclusions that will satisfy everybody, we think we have applied principles of equity to the singular facts of the case which do substantial justice to all.

Judgment reversed.

JOSHUA DANIEL, *alias* JOSHUA NEAL, plaintiff in error, *vs.*
THE STATE OF GEORGIA, defendant in error.

That a juror, after being charged with a criminal case, was allowed to separate from the jury, is ground of new trial, unless it be affirmatively shown that he had no communication with any one upon the subject of the trial, either directly by conversation, or indirectly by overhearing the observation of others.

Criminal law. Jury. New trial. Before Judge POTTLE.
Warren Superior Court. April Term, 1876.

Reported in the decision.

SEABORN REESE, for plaintiff in error.

SAMUEL LUMPKIN, solicitor general, for the state.

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WARNER, Chief Justice.

The defendant was indicted for the offense of murder, and on the trial therefor the jury returned a verdict of guilty, with a recommendation to the mercy of the court. A motion was made by the defendant for a new trial, on the several grounds therein set forth, which was overruled by the court and the defendant excepted.

It appears from the evidence in the record that the defendant went to a house where the deceased was, (not his own house) and asked him "what lies he had been telling on him;" deceased replied, "go away, Josh, I don't care if you never speak to me again." They continued talking, giving each other the lie, when deceased said he would not quarrel with him, but was going to attend to his own business, and went out of the house; defendant followed him and picked up a piece of an old stump laying near the door, about three feet long; deceased went to the edge of the yard and picked up an axe lying there, the axe resting on the ground; in that position they continued giving each other the lie, when deceased said, "I ain't telling no lie;" defendant told him if he said that again he would kill him, appeared to get mad, jumped at deceased and wrung the axe out of his hands, and told him, God damn him he would kill him, and struck him on the head with the axe, which blow killed him, breaking his skull; struck but the one blow.

One of the grounds of the motion for a new trial is, that one of the jurors, after being charged with the case, was allowed to separate from the jury without being accompanied by any officer, and to go across the street to the store-house of Jones, in the town of Warrenton, one hundred yards from the court-house, and return; that there was a crowd of persons there through which the juror was obliged to pass, and did pass, in going to and returning from said store-house. The fact of the separation of the juror as alleged, is not denied, but he states in his affidavit that he went to the store-house to get his overcoat; that *he* did not speak to any one, and that no one spoke *to him* about said case; but the juror fails

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to state in his affidavit that he did not hear any person or persons in the crowd through which he passed speaking or expressing their opinions about the case. One of the reasons why the law requires jurors to be kept together, separate from the crowd of people who may have heard the trial as well as others is, that they may not be influenced in rendering their verdict by the expression of the opinion of others or by popular clamor. When the law was violated by the misconduct of the juror, the legal presumption was that the defendant was injured, and it was incumbent on the state to have rebutted that legal presumption, not only by evidence that the juror did not speak to any one himself, nor did any one speak to him about the case, but that he did not hear any one in the crowd through which he passed express any opinion in relation to the case. Jurors are as liable in our day to be influenced and controlled by public opinion, as Pilate was in his day, when by the clamor of the multitude he consented to deliver up our Saviour to be crucified. The policy of the law is to protect jurors from all such influences and temptations in the trial of criminal cases, as well as defendants who may be injured thereby. In view of the misconduct of the juror, Ricketson, and other irregularities complained of at the trial, we reverse the judgment of the court below and order a new trial.

Judgment reversed.

GEORGE H. LESTER *et al.*, administrators, *et al.*, plaintiffs in error, vs. JAMES D. MATHEWS, defendant in error.

1. A temporary administrator cannot bind the estate by a contract to pay fees to resist the setting up of a will on an issue of *devisavit vel non*. His business is to collect and to take care of the effects of the deceased until *permanent* letters are granted, either letters testamentary or of administration, as that issue may determine; he has no authority to involve the estate by employing counsel for or against the will.
2. Nor can a permanent administrator ratify such a contract made by the temporary administrator and the children of the deceased, so as to bind

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the estate, either by payment of part of the fees or otherwise; nor can he make the illegal contract of the temporary administrator a valuable consideration to support his promise to pay by coupling with it future services to the estate. He may employ counsel according to the exigencies of the estate: Code, section 2543; but such an employment must be distinct from the assumption of illegal contracts made by his temporary predecessor.

3. The words "expenses of administration" in the statute, Code, section 2533, do not include counsel fees against a will on an issue of *devisavit vel non*, nor do they, of themselves, in a verdict or consent decree, include such fees; nor can the consent verdict or decree be amended on a common law declaration to recover the fees. It must be done by regular proceeding in equity or at law for that purpose, with proper parties and pleadings: *30 Georgia Reports, 191.*
4. If the administrators reside in the county giving the court jurisdiction, and all the other defendants in other counties, and there be no cause of action against the administrators, the court will not have jurisdiction of the non-residents of the county, though a good cause of action exists and is alleged against them. The suit will be dismissed as to all, the non-residents having the right to be sued in the counties of their own residence, or that of some of them, if the contract be joint.

Administrators and executors. Contracts. Ratification. Fees. Jurisdiction. Before Judge POTTLE. Oglethorpe Superior Court. April Term, 1876.

Reported in the opinion.

COBB, ERWIN & COBB, for plaintiffs in error.

JOHN C. REED; SAMUEL LUMPKIN, for defendant.

JACKSON, Judge.

This case was a demurrer to a declaration filed by Mathews against the administrators and heirs-at-law of the estate of Dupree, for fees alleged to be due plaintiff on account of services rendered the estate. The declaration alleged that the plaintiff, in the year 1870, was employed by the children of Dupree, on an issue of *devisavit vel non*, as counsel for said children against the will, and was further employed by Hurniutt and Lester, temporary administrators, with the consent of the children, as counsel for the estate; that by his contract with them he was to receive a retainer of \$2,000 00 and five

per cent. upon the value of the estate saved to the children if the will was set aside; that he rendered the services, which were worth \$10,000 00; that the will was set aside by a consent verdict after much litigation in the superior and supreme courts; that by the verdict \$164,000 00 was saved to the children, and they and the administrators agreed to allow plaintiff \$10,000 00 in full of all services, provided plaintiff would continue to represent the estate in all business in Oglethorpe and Clarke counties; that he has represented them, and stands ready to do so in said business, which is litigious and important; a bill of particulars setting forth the account and balance due is annexed, amounting to \$3,707 00, and it is alleged that this amount is due by Hunnicutt and Lester, now the permanent administrators, to the plaintiff. Plaintiff further alleges that the consent verdict, which is appended to the declaration, and which sets out the fees to be paid to propounder's counsel "after expenses of administration," meant, by the expression "expenses of administration," the fee of plaintiff and his associates, and that the fees of his associates and much of his own were paid by said administrators under the verdict, and so receipted for, with the consent of all parties, and that all are thereby estopped from denying that the balance of his claim is payable under the verdict as "expenses of administration;" and adds a prayer that if the consent verdict does not include the fee under the term "expenses, etc.," that it be corrected and made to express it.

There are amendments to the declaration claiming a larger amount, and alleging that on the promise of the administrators and children or their legal representatives, to pay him as expenses of administration, he discharged his duty as counsel, and the administrators are bound to pay him on the faith of that promise, and because his services are reasonably worth the sum claimed. The declaration shows that all the children or heirs sued reside out of Oglethorpe county.

To this declaration the defendants demur, on the ground that no legal cause of action is set out against the administrators, and that the other defendants, the heirs, reside in

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counties other than Oglethorpe, and the superior court of that county has no jurisdiction in this case over them. The court overruled the demurrer, the defendants excepted and assign for error the overruling the demurrer.

The declaration strikes us as novel in character and form. It joins at common law the administrators and some of the heirs of an estate, and seeks to recover from the administrator, on a joint promise made by certain children, heirs-at-law of an estate, and certain temporary administrators. It fortifies the claim by setting out a consent verdict and judgment or decree which provided for the payment of a totally different class of fees after "expenses of administration" shall have been paid, and alleges that "expenses of administration," mean in law a fee to resist, by the heirs-at-law, the setting up of a will, and if the words do not bear that signification in law, it asserts that the parties to the consent verdict so meant, and makes the the singular prayer in a declaration to recover money at common law, that the verdict and judgment be so amended as to make expenses of administration mean fees to counsel employed by heirs-at-law to set aside a will. It seems to us rather a novel proceeding even under the very liberal and loose practice pursued in the courts of our state.

Analyzing the proceeding as well as we can, and searching for the foundation on which it is based, the questions seem to us to be these: 1st. Can a temporary administrator make a contract in connection with a part of the heirs-at-law, or all of them, with counsel to resist the probate of a will so as to bind the estate and compel the permanent administrator to pay the fee agreed upon? 2d. If the permanent administrator pay other fees similarly bargained for and part of those agreed to be paid to the plaintiff, does such payment ratify the contract made by the heirs and the temporary administrator, so as to bind the estate, and compel the payment of the part unpaid? 3d. Do the words "expenses of administration" mean fees to resist the probate of a will as part of those expenses, and if they do not mean that, can the mistake be corrected in a suit at common law to recover the fee? 4th. Can the heirs

at law who employed counsel to resist the will, be sued in the county of the residence of one of the administrators, or must they be sued on their contract in the county of their own residence ?

1. In respect to the first question, it seems to us the provisions of the Code settle it. The temporary administrator is appointed "for the purpose of collecting and taking care of the effects of the deceased, to continue and have effect until permanent letters are granted:" Code, section 2487. Of course he may employ counsel, if necessary, to collect the effects, and so to take care of them, to keep them from strangers. Hence he may file an affidavit of illegality—39 *Georgia Reports*, 565—to keep the effects from passing out of his hands, to prevent their sale, to take care of them until the regular administrator be appointed; but nobody is trying to take away the estate on a *devisavit vel non* from his custody. The sole question then is, shall the estate be administered by the will or by the statute of distribution; shall the man to whom the temporary administrator is to turn over the estate, after his temporary preservation of it is over, be an executor or a permanent administrator? Neither the one nor the other is intermeddling with him in any duty the statute assigns to him, and his business in respect to their controversy is to hold the stakes and not take sides. Section 2489 of the Code is stronger still, if possible. It seems to have been passed to meet such a case as this. Pending an issue of *devisavit vel non*, that section says temporary letters may be granted unless the will has been proven in common form. Granted, for what purpose? To fight the will? To contract to pay large fees to overthrow the will? Hardly, we think; but simply to collect and preserve the property until it is settled by law under what rules that property shall be administered. We think, therefore, that the temporary administrator could not legally make a contract for fees to bind the estate in the case at bar.

2. The second question is, did these administrators ratify this contract of themselves as temporary administrators and

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these children by paying part of the fees and other fees of like character? If the contract was illegal when made, and did not then bind the estate, we cannot see how permanent administrators could ratify it if they had expressly done so. It is true that they could have employed counsel, according to the exigencies of the estate: Code, section 2543; but we look in vain for their authority to ratify a contract made by the heirs, and make their debt an estate debt, and make it rank, too, ahead of all debts, even judgments, by making it payable as expenses of administration. The policy of the law, for the benefit especially of children, is to hold administrators strictly to the duties defined by law, and not to allow them to make or ratify contracts not for the benefit of the entire estate, not for the proper administration of the same for the benefit of creditors and heirs, but for the benefit of certain heirs interested in the estate and engaged with others interested in a contest over a will of the testator. But there is no express ratification or assumption of the debt alleged after the administrators were clothed with the permanent trust. It is implied from their conduct in paying similar debts and a part of this debt, and the doctrine of estoppel is invoked. It is said, because the administrators have paid a part, they are estopped from denying their liability to pay all. The doctrine of estoppel is not favored by the courts, and its application here would extend it further than reason will allow us to go. We do not see how the plaintiff has been injured by others having been paid or by his having his own fee paid in part. He is in no worse condition than he was before, but is bettered to the extent that he has been paid. It may be said that the contract is supported by the fact that the plaintiff agrees to perform future services in Clarke and Oglethorpe counties, but the price for these services is not fixed separately from the general claim, and we could not separate it, therefore, and hold the writ good for that amount against the administrators, if the law would authorize that part to be sustained. But really the heirs can have nothing to do with that. That is exclusively the business of the administrators, and we cannot

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see what concern they can have with it so as to be sued therefor out of the counties of their residence.

3, 4. But it is claimed that this debt is due as expenses of administration, and that this suit is brought upon the consent verdict to ascertain the amount of this fee as part of such expenses, and to compel the administrators to pay it as such. We do not think such a fee embraced in the meaning of those words. It is there said the parties so meant the words to be understood, and it is asked that to support this declaration the consent verdict or decree be amended so as to embrace fees. This cannot be done in this proceeding. It was done on a motion for a new trial in *Lucas vs. Lucas*, 30 *Georgia Reports*, 191, but in the same case it is said that except in case of such a motion the verdict or judgment or decree can only be rectified by bill. Inasmuch as now a party is never forced into equity when he can have equity relief granted at law, we think it might be rectified on a proper case made between proper parties, with distinct pleadings either in equity or at law; but in a suit at law to recover the money, to mix up such equitable relief with the parties now in court in this case, would be an anomaly indeed; in the language of the chief justice, in another case, it would be a legal hermaphrodite. It is clear that if there be no right of action against these administrators, there is nothing to hold the heirs, who live in other counties, in court. In the view we take of the case, we are constrained to sustain the demurrer and to reverse the judgment.

Judgment reversed.

FRANCIS P. SMITH *et al.*, plaintiffs in error, vs. HAMLIN J. COOK, defendant in error.

Where a record does not affirmatively show that any final judgment or decree has been rendered in the court below, there is nothing for this court to review, and the writ of error will be dismissed.

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Practice in the Supreme Court. Before Judge KIDDOO. Baker County. At Chambers. November 26th, 1875.

Reported in the decision.

VASON & DAVIS; A. L. HAWES, by D. H. POPE, for plaintiffs in error.

STROZER & SMITH; R. F. LYON; R. N. ELY, for defendant.

WARNER, Chief Justice.

This was a motion for a new trial, as stated in the bill of exceptions, in an equity cause, in which Hamlin J. Cook was complainant, and F. P. Smith and D. D. Smith were defendants, on the trial of which it is alleged that a decree was rendered in favor of the complainant, but the record before us does not disclose the fact that any verdict or decree was rendered in the cause which this court can either affirm or reverse. If the record contains a full and complete exemplification of the case, as the clerk certifies it does, then it is still pending in the court below, for there does not appear to have been any final disposition of the cause as required by the 4250th section of the Code.

This case comes within the ruling of this court in the case of *Bean & Company vs. Hadley*, decided at the present term. Inasmuch, therefore, as the record brought here by the plaintiff in error does not affirmatively show that any verdict or decree has been rendered in the cause which this court can either affirm or reverse, it is ordered that the writ of error be dismissed.

JOHN WILLIAMS, plaintiff in error, *vs.* MARY A. STEWART
et al., defendants in error.

1. Suit by attachment will not be enjoined at the instance of a person who is no party thereto, unless it appears that it is proceeding to his injury, and under circumstances that entitle him to interfere by such means for the protection of his rights.
2. That a promissory note has been paid off by the maker, is no cause for enjoining a pending suit thereon against the indorser. Such payment will be a defense at law.
3. The vendor of land who retained the titles, giving only a bond for titles, and who has transferred the notes taken for the purchase money, indorsing them, and who is sued on his indorsements, has no right, because of these facts, and because the purchaser is insolvent, to enjoin the purchaser from selling the land, or from collecting the rents, or a small debt due for timber cut from the land and sold, or to have a receiver appointed to take charge of the land and collect the rents and the debt for timber.

Injunction. Attachment. Vendor and purchaser. Bond for titles. Before Judge CLARK. Sumter Superior Court. April Term, 1876.

Williams filed his bill making, in brief, this case:

On September 2d, 1869, complainant sold to Emmett M. Greeson and his mother, Mary A. Stewart, a lot of land in said county, for \$4,135 00. He took in payment therefor two notes on said Greeson, one for \$1,935 00, dated September 27th, 1869, and due April 1st, thereafter, bearing interest at twelve and one-half per cent. after maturity; the other for \$2,200 00, of same date, and due on the 25th of December, thereafter, bearing same interest after maturity. He delivered to Greeson his bond conditioned to convey by warranty deed, on the payment of said notes. The purchasers were placed in possession and have so remained, the premises being of the yearly rental value of \$700 00. The first note was paid off by Greeson to one Burton, the then holder, either in 1871 or 1872. The second was indorsed to Harrold, Johnson & Company, who, in September, 1873, instituted suit thereon against complainant in the county of Schley. In the same month and year, and in the same county, Mary A. Stewart

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instituted suit against complainant on the first note, pretending to be the owner thereof, and to have traded for the same, when she knew it had been paid off by her son. She has also sued out an attachment against her son on said note in Fulton county, where they both reside. Greeson was a minor at the time of said purchase, and his mother was the real party to the trade. She has been since in the occupancy and enjoyment of the land, receiving the rents, etc. One John Wilder is now in possession, having rented the land from the said Mary A. and her son, for the year 1874. One Samuel Heys is indebted to said mother and son \$40 00 for timber cut off said land. The said Mary A. and her son are insolvent. Complainant therefore prays as follows:

1st. That said purchasers be enjoined from selling the land, from collecting the rents therefor, and from collecting the aforesaid amount due for timber; and that their tenant and the said Heys be enjoined from paying the same to them.

2d. That said Mary A. be enjoined from prosecuting her attachment against her son in Fulton superior court; and also from proceeding with her action against complainant on his indorsement, in Schley superior court.

3d. That some proper person be appointed receiver to collect the rents and the amount due for timber, and to take charge of the land.

4th. That the land may be sold and the proceeds thereof paid to Harrold, Johnson & Company in liquidation of the note held by them; that the sale by complainant to the said Mary A. and her son be canceled, and the note for \$1,935 00 be decreed to be surrendered, canceled and paid.

5th. General relief.

The bill was answered, and affidavits filed, all of which is deemed immaterial here.

The chancellor refused the injunction and the complainant excepted.

HAWKINS & HAWKINS, for plaintiff in error.

GUERRY & SON, for defendants.

BLECKLEY, Judge.

1. Why should injunction be ordered, at the complainant's instance, to stay the attachment suit pending in Fulton in favor of the mother against her son? Upon what is that attachment levied? It does not appear by the bill. How will or can the suit prejudice the complainant? This is not shown, or even suggested, by the bill. What occasion is there for him to interfere with this *family attachment*?

.2. On the facts alleged, injunction is not needed to protect the complainant against a recovery in the pending suit against himself on the paid note. That he ever indorsed that note is not distinctly averred; but if he did, and if the suit is founded on his indorsement, payment by the maker will be a complete defense at law.

3. Several reasons occur to us why a sale of the land by the vendee and his mother cannot be restrained for any cause shown in the bill. There is no allegation that they intend to sell it, or have endeavored to sell it. For aught that appears, they have nothing of the sort in contemplation. But how could they sell it, so as to put it out of complainant's reach? He has the legal title. Upon that title he could now, or hereafter, recover the land in ejectment. As long as he is liable upon his indorsement of either of the notes given for the purchase money, or as long as he is not reimbursed, should he pay off his indorsement, the legal title will remain where it is, unless he chooses to part with it. Let him stand upon that. Why does he not sue and recover the land? There is no obstacle that we can see. And this resource will be available, whether the land is sold by others or not. Another measure is also open to him, which is, to meet his obligation as indorser upon the note not paid off, bring suit upon that note, file a deed, and sell the land in the manner prescribed by the Code. But he has instituted no suit, either for the land or the purchase money. This brings us to his prayer for injunction against collecting the rents and the small note for timber, and for the appointment of a receiver. He

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has brought no suit, nor does he render any excuse for not doing so. He does not allege that the land is insufficient to pay for itself, that it has depreciated in value, or that any waste has been, or will be, committed. He makes no case for the extraordinary remedies of chancery: 51 *Georgia Reports*, 602; *Tufts vs. Little*, 56th *Ibid.*, 139.

Judgment affirmed.

JOHN R. WORRILL *et al.*, plaintiffs in error, vs. FRANCIS M. COKER, defendant in error.

Where the complainant was the assignee of a mortgage, and had foreclosed and levied it upon the defendant's land, said mortgage being for the purchase money thereof, and pending litigation in reference thereto, the parties agreed upon a settlement, to the effect that defendant should pay annually so much money, giving his notes therefor, but if he failed to pay any note, that the mortgage *fi. fa.* should proceed to levy and sell the land, retaining for that purpose all its priority of lien and vitality, and defendant paid one of the notes but failed to pay the next two that were due, and complainant proceeded to advertise the land under the old levy on the *fi. fa.*, and the defendant's wife, by collusion with her husband, claimed the land, and complainant filed a bill against husband and wife, alleging the foregoing facts, in substance, and further alleging the insolvency of both defendants, husband and wife, and the waste of the land by the defendants, so that it would soon be so exhausted, and the timber so destroyed that the land would not near pay the purchase money, and praying for a receiver to take charge of the land, and hold the rents, issues and profits thereof to await the final hearing of the cause; and where a receiver was appointed, and, on the trial, the defendants demurred to the bill for want of equity, and moved to vacate the appointment of the receiver, and the court overruled the demurrer, and refused the motion to vacate:

Held, that there is equity in the bill, and that the court did right to overrule the demurrer; and that this court will not control the discretion of the chancellor in retaining the receiver until the final disposition of the case.

Equity. Vendor and purchaser. Receiver. Before Judge CLARK. Sumter Superior Court. October Adjourned Term, 1875.

Reported in the opinion.

HAWKINS & HAWKINS; J. A. ANSLEY, for plaintiffs in error.

B. P. HOLLIS; LANIER & ANDERSON, for defendant.

JACKSON, Judge.

This case rests on the following state of facts : On the 8th day of October, 1863, John R. Worrill executed to Barney Parker his mortgage deed of said date, to secure the payment of two promissory notes, which came due respectively on the 1st day of January, 1864 and 1865, which notes were given for a tract or settlement of land in Sumter county, for the sum of \$4,000 00 each, making in the aggregate \$8,000 00, which were assigned by said Parker to F. M. Coker, in the year 1866. At the October term of the superior court of said county, Coker instituted his suit for the foreclosure of said mortgage, which was defended by Worrill, and at the October term of said court, 1871, Coker recovered his judgment of foreclosure for the principal of said notes. Worrill made a motion for new trial, which was overruled, and excepted to the judgment of the court overruling said motion, which was carried to the supreme court by writ of error, etc.

About the time the bill of exceptions was filed in the clerk's office of the court below, Coker sued out a mortgage *fi. fa.* founded on said judgment of foreclosure, had said land levied upon on the 19th day of December, 1871, which levy was superseded by Worrill, at the time of filing said bill of exceptions.

While said cause was pending in the supreme court, said Coker and Worrill compromised said case, which was entered into on the 1st day of June, 1872, the terms of which compromise were put in writing and signed by said Worrill and Coker, which is as follows, to-wit :

“GEORGIA—SUMTER COUNTY :

“ *This is evidence of contract this day made and entered into between F. M. Coker and John R. Worrill, both of said county and State :*

“ 1st. Worrill agrees, and does hereby discontinue, and dismiss all suits at law or in equity, which he has against Coker without cost or expense to Coker.

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"2d. Worrill now executes his certain promissory notes payable to F. M. Coker or bearer, one for \$250 00 due first of November next, and four other promissory notes, each for \$1,250 00, due respectively on the first of June, 1873, 1874, 1875 and 1876, these notes, and the one for \$250 00, all bearing interest at the rate of ten per cent. per annum from and after this date, all of which the said Worrill agrees to pay punctually at maturity.

"3d. Worrill is to settle with L. C. Barrett all his claim in the Gibbons M. Taylor mortgage claim, which he has already done.

"4th. Worrill now dismisses his writ of error filed in Sumter superior court, in the case of F. M. Coker vs. John B. Worrill, the same being a judgment foreclosing mortgage on realty, and agrees to let the judgment for \$8,000 00 in that case stand and be permanent, and let *fi. fa* issue thereon and remain in the hands of F. M. Coker, to be levied and used in case the said Worrill shall fail to pay punctually the notes described in the second part of this contract, and in case said judgment has to be so used it is to remain good for the \$8,000, interest and costs, called for by the face thereof, and in case of the failure to pay said notes punctually at maturity, or any one of them, then said judgment shall be free from any plea or legal exceptions thereto on the part of said Worrill.

"5th. Coker agrees to hold up, and not proceed to enforce the collection of the \$8,000 00 judgment described in the fourth part of this contract until there is, or may be a failure on the part of the said Worrill to pay punctually any one of the notes described in the second part of the contract.

"6th. In case of the prompt and punctual payment on the part of Worrill of the notes described in the second part of this contract, then at the end of the last payment the said Coker agrees to cancel the judgment for \$8,000 00, described in the fourth part of this contract, and the mortgage on which it is based, and deliver the whole over to Worrill, but should the notes not be paid as aforesaid, then the *fi. fa.* for the \$8,000 00, is to be valid and intact to all intents and purposes in favor

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of the said Coker for the full amount, and he shall be at liberty to proceed to levy and sell the property included in the said mortgage and mortgage *fi. fa.*, and it shall remain valid and be considered so, and the property subject to sale as though there never had been any compromise, if the notes described in the second part of this contract shall not be punctually met and paid as they mature. Worrill is to pay all costs in the settlement of all the cases.

"In testimony whereof the parties hereto have hereunto set their signatures, this the first day of June, 1872.

"This compromise is to settle Coker's half interest in the Taylor mortgage claim for some \$3,800 00, dated in 1862; and is to settle all claims had by Worrill against Coker.

"The \$8,000 00 mortgage judgment being for the purchase money of the land included in the mortgage, this compromise is not to affect the priority or lien which the law gives to this character of debt. Signed in duplicate.

"JOHN R. WORRILL,

"F. M. COKER."

Worrill paid the first note named in said contract of compromise, but failed to pay the two next falling due; and on the 3d day of December, 1874, Coker was going forward to advertise and sell said land by virtue of said mortgage *fi. fa.*, under the said old levy, when Geraldine Worrill, wife of said John R., interposed her claim to said land, and at the same time made an affidavit, under the statute in such case made and provided, of her inability to give the bond and security required by law, on account of her poverty. Whereupon Coker filed his bill setting up the foregoing facts, charging waste and mismanagement of said plantation, and fraudulent combination between said John R. and the said Geraldine to hinder, delay and defraud him in the premises, and the insolvency of all the parties defendant to said bill, and concluded said bill with a prayer for an injunction against waste and mismanagement, and the appointment of a receiver to receive the rents, issues and profits of said land, subject to the final decree of the said court, with a waiver of discovery, etc.

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At the hearing, under an order of the court to show cause why said injunction and the appointment of a receiver should not be granted, the chancellor rendered a decree appointing a receiver in the words following, to-wit:

"After hearing the bill, answer and affidavits in this case, and after argument of counsel, it is ordered, that Moses Speer, Esq., be, and he is hereby appointed receiver, to take charge of the farm mentioned in said bill, and receive the crops, issues, rents and profits arising therefrom, and hold them subject to the order of the court. If John R. Worrill withdraws his mules and other stock from said farm, which he is at liberty to do, the complainant, Coker, must furnish such stock as is necessary to said farm. He is also to supply said farm with all needful implements of husbandry, and furnish all such supplies as are necessary to keep said farm in running order, and necessary to further the crop.

"After the crops of the year are gathered, the receiver will report to this court the amount and kind thereof, and will keep an account of all expenditures and receipts, and be ready at any time to report to this court.

"J. M. CLARK, J. S. C. S. W. C.

"At Chambers, August 2d, 1875."

And afterwards, during the October adjourned term of said court, 1875, defendants, by their counsel, entered their general demurrer to said bill, for the want of equity, and moved to dismiss said bill and discharge said receiver, which demurrer was overruled, and the receiver retained by the court, and defendants excepted.

The question, therefore, is, do the above recited facts make a case for the interposition of equity? If the case stood between Parker, the vendor and mortgagee, and Worrill, the purchaser and mortgagor, and if, as is alleged, the defendants were insolvent and were committing waste, there being a certain lien on the land in the way of a mortgage to secure the purchase money, there can be no doubt that there would have been equity in the bill: *Tufts vs. Little*, 56th Georgia Reports, 139; *Chappell vs. Boyd et al.*, this term.

Does it make any difference that the mortgage is in the hands of an assignee for value? We can see none. The assignee is subject to all the equities between the original parties: Code, section 2244. Why is he not entitled to all the rights and equities of the original mortgagee? If the defendant in mortgage may defend as against the original mortgagee, and set up all defenses legal and equitable, why should not the assignee prosecute in the same way, and be clothed with all the rights of the mortgagor? If liable to all the defenses, why is he not panoplied with all the offensive armor of his vendor? We cannot see why not. But here, in this case, Worrill has recognized the assignee as fully in the shoes of this mortgagor; he has treated and traded with him as such mortgagor, about the mortgage, its execution and enforcement; got time from him upon a new agreement, broken that new agreement, and now has got his wife to claim the land that he may waste it all. Such are the allegations, and they are all admitted by the demurrer. The equities of the bill are thick as hops, and we affirm the judgment overruling the demurrer. Some point was made on the right of Coker to proceed with his old levy, as the contract of compromise stipulated that he might levy and sell, indicating, it is urged, a new levy. We think this point very thin. Equity has possession of the whole case now, and her eyes are too searching not to penetrate such shadowy devices. It cannot matter to Worrill whether an old or a new levy shall sell the land, or whether it shall be sold by decree in chancery. His duty is to pay the money he promised, and thus he can stop any sale of it. It follows that the receiver should have been retained.

Judgment affirmed.

C. M. PAYNE, treasurer, plaintiff in error, vs. A. M. PERKERSON, sheriff, defendant in error.

- 1 Pleadings cannot be waived.
- 2 *Mandamus* absolute cannot issue at Chambers.
- 3 *Mandamus* absolute cannot issue against a county treasurer directing him to pay a claim alleged to be due to the sheriff, but which is neither stated in the affidavit of the latter to be due him by the county, nor to have been demanded by him from the treasurer, nor from any other officer of the county.
- 4 The treasurer never having had notice of the proceedings upon which the order was based, the judgment was not binding upon him.

Mandamus. Pleadings. Waiver. County matters. Judgments. Before Judge PEEPLES. Fulton County. At Chambers. February 12th 1876.

Reported in the decision.

JOHN T. GLENN, by JACKSON & LUMPKIN, for plaintiff in error.

JOHN L. HOPKINS, for defendant.

WARNER, Chief Justice.

It appears from the record in this case that the sheriff of Fulton county made out an account containing a list of prisoner carried to and from the jail of said county to the superior court, at different terms thereof, amounting to the sum of \$756 25, which was sworn to by him as being true and correct, on the 20th of June, 1876. It also appears that an agreement was entered into, between the attorney for the sheriff and the ordinary of Fulton county, that a formal application for a writ of *mandamus* should be waived, and that the presiding judge should hear and determine the motion for a *mandamus* absolute, as if the same had been formally presented, and that he might determine the same at his convenience. This agreement was not signed by the county treasurer. It further appears from the record, that on the

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12th of February, at chambers, the presiding judge passed the following order: "It is considered and ordered that the foregoing amount is a just and proper charge on the county treasury, and that a *mandamus* absolute issue requiring and commanding the payment of the same." On the same day, the clerk of the superior court of Fulton county issued a peremptory writ, in pursuance of said order, directed to C. M. Payne, county treasurer of Fulton county, commanding him to pay the said sum of \$756 25, in obedience to the aforesaid order. Service of this writ was acknowledged by Payne on the 14th of February, 1876, and payment of the amount specified therein was demanded of him by the sheriff's attorney on the same day, which was refused. To the granting of the aforesaid order and judgment by the presiding judge, Payne, the county treasurer, excepted.

The granting of the order and judgment as set forth in the record, was error: First, because there were no pleadings which would have authorized the judge, under the law, to pass such an order or judgment. By the twenty-first common law rule of court, no consent to dispense with pleading will in any case be allowed: See Code, section 204; *Central Bank et al. vs. Johnson & Smith*, decided at the last term. Second, if the pleadings could have been waived by consent, Payne, the county treasurer, against whom the writ was ordered to be issued, was no party to that consent or agreement. Third, the writ of *mandamus* was ordered to be issued at chambers, and not in term time. Whereas, the statute allows writs of *mandamus*, *quo warranto*, and prohibition, to be granted at any time, on proper showing made, but requires that the return thereof shall be made in *term time*: Code, section 3201; *Doughty, Pearson & Company vs. Walker*, 54 *Georgia Reports*, 595. Fourth, the account made out by the sheriff is not made out against the county of Fulton, nor does he state in his affidavit that the amount of the account is due him by the county, or that he has ever demanded payment thereof of the county treasurer, or of any other officer of the county. Fifth, Payne, the county treasurer, against

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whom this order and judgment was awarded, never had any notice of the proceedings upon which it was obtained, was no party thereto, and never had his day in court to be heard or to show cause, so far as the record discloses, why the order and judgment requiring and commanding him, as county treasurer, to pay the said account of \$755 25, should not be granted. The first notice that he appears to have had of the proceeding was on the 14th of February, 1876, when he acknowledged service on the writ of *mandamus* issued by the clerk in pursuance of that order and judgment, and waived a copy thereof, and refused to pay the amount claimed therein when demanded of him by the sheriff's attorney. On the statement of facts contained in the record, this judgment is, in one respect, like that peace of mind of which we read, it "passeth all understanding," especially all *legal* understanding.

Let the judgment of the court below be reversed.

AUGUSTIN A. FLETCHER, executor, plaintiff in error, vs.
JOHN W. RENFROE, treasurer, defendant in error.

1. An executive warrant upon the treasury of the state, authorizing the payment of money in pursuance of an appropriation made by law, is not a contract nor in the nature of a contract, but is only a license or power, and is revocable so long as the payment which it warranted has not been made.
2. If revocation cannot take place by the separate act of the governor, it can take place by the joint act of the governor and the general assembly; and a resolution passed by both houses and approved by the governor, instructing the treasurer not to pay the warrant, is a virtual revocation.
3. In the face of such a resolution the judiciary will not, by *mandamus*, compel the treasurer to recognize the warrant and pay out money under it.

State. Governor. Executive warrant. *Mandamus*. Before Judge PEEPLES. Fulton Superior Court. April Term, 1876.

Fletcher, as executor of Henry G. Cole, deceased, held two executive warrants signed by Benjamin Couley, as governor.

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of the state of Georgia, dated December 7th, 1871, by the first of which the treasurer of the state was directed to pay to said Cole or bearer, \$6,914 35, and by the second, \$7,345 00, "out of any moneys which now are, or hereafter may be, in the treasury, not otherwise specially appropriated, and place to account of 8th section, act of 24th October, 1870, to lease Western and Atlantic Railroad." The first warrant concluded with the words "Judgment of court against Western and Atlantic Railroad;" the second with "Being claim against Western and Atlantic Railroad, audited by Board of Commissioners." Both were approved by Madison Bell, the then comptroller general, on the day after their date. Needham L. Angier, the then treasurer of the state, declined to pay the warrants. The general assembly, by joint resolution approved by James M. Smith, governor, on August 24th, 1872, directed the treasurer not to pay the first of the above named warrants, and by joint resolution approved August 26th, 1872, gave similar directions as to the second. Conley was succeeded by Smith, as governor, and Angier by Jones, as treasurer. Jones was succeeded by Renfroe. Demands were made either by Cole or his executor, upon each of the aforesaid treasurers, for payment. Angier simply declined to pay the warrants; Jones and Renfroe referred, as ground for their refusal, to the aforesaid joint resolutions. Cole applied for the writ of *mandamus* against Jones, as treasurer, but before this proceeding was terminated the former died and the latter ceased to be treasurer. Fletcher, as executor of Cole, then applied for *mandamus* against Renfroe, the present treasurer. Amongst other grounds why *mandamus* should not issue against him, the latter set up the aforesaid resolutions. The petition was refused and the applicant excepted.

Many other questions were made, but are not reported as immaterial in view of the decision.

♥ LESTER & THOMSON; McCAY & TRIPPE, for plaintiff in error.

N. J. HAMMOND, attorney general, for the defendant.

BLECKLEY, Judge.

This is a case of first impression. None like it has been cited by counsel, and none has been discovered by our own research since the argument. We shall confine our opinion to a very narrow range, keeping in view the one practical question for decision, which is, whether the remedy of *mandamus* is available to the petitioner on the state of facts in the record. We do not find it necessary to rule whether a valid appropriation of money for the payment of the claims which he seeks to collect from the state has been made or not. For the purposes of our decision, it may be conceded that the appropriation is regular, and in all respects legal. It may also be conceded that the executive warrants were duly issued, and that it was the legal duty of the treasurer then in office to pay them. The further concession may be made that *mandamus* might have been evoked to compel payment. But the writ was not applied for on the refusal of that officer to act as the warrants directed him to act. He went out of office leaving the money unpaid, and the governor, by whom the warrants were issued, went out also. These warrants descended upon their successors as outstanding; and, so far as appears, no successor in either office has recognized them as entitled to payment. On the contrary, the governor has approved the joint resolutions of the general assembly, passed in August, 1872, instructing the treasurer not to pay them. These resolutions have been acted upon and obeyed both by the present incumbent of the treasury and his immediate predecessor. No money can be paid out of the treasury before it is appropriated. Neither can it be paid out after it is appropriated without more. There must be either express legislative authority to pay without the governor's warrant, or the governor's warrant must be produced: Code, sections 5064, 76, 92. Appropriation casts no duty upon the treasurer to pay. His duty arises from the conjunct operation of the appropriation and the warrant. One is as indispensable as the other. And it admits of grave doubt whether a warrant issued by a gov-

error other than the one in office when the payment is made can be legally recognized by the treasurer without approval, express or implied. There is much in the Code tending to show that the living, active head of the executive department is set as a perpetual guard over the treasury. To unlock the vaults under the fiat of a predecessor, without the concurrence of the incumbent, would lessen the security against frauds and forgeries, and would, at all events, cut into the unity of fiscal administration. It would be no strain of construction to hold that the system of the Code contemplates payment on warrants of the governor for the time being, and that those issued by previous governors are either to be renewed or sanctioned by the incumbent in some form before they can gain recognition at the treasury. The law does not require warrants to issue under the seal of the department, as it probably would do if it contemplated that they should remain of force indefinitely. It would seem that in cases of unlimited appropriations, at least, the warrants drawn by previous governors, and left over, ought to be approved or redrawn to make them effective. "Any money in the treasury not otherwise appropriated," is a far-reaching expression, and if old warrants can take the money as fast as it comes in, the governor in office may be subjected to a succession of financial surprises very embarrassing to him and very injurious to the state.

1. But we need not hold that the treasurer must have the co-operation of the governor for the time being to enable him to deliver money from the treasury. That point can be treated as not necessarily involved here; for if executive warrants are subject to revocation, these have been revoked. Are they subject to revocation? What are they? Not bills or notes. The governor has no power to execute bills or notes and bind the state. Are they contracts at all, or in the nature of contracts? We think not. They are not engagements between party and party, but the mere license of the governor, authorizing the treasurer to pay money. The creditor need not have possession of them at all. He need never see them. They

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are official documents passing between two officers of the state, and may be handed from one to the other without the intervention of anybody. Usage has established a different course of dealing, but there is nothing in the nature of things that requires it. If the governor pleased to do so he might send every warrant he issues to the comptroller general, and after its approval by that officer, have it brought back to his own office and there held till paid. This would, perhaps, involve a change in book-keeping and in the system of receipts, but nothing more. It would change no legal right of the creditor, for his right is to have the money, not to have the warrant. The warrant creates no debt. It is the letter of the attorney which the state, by the governor, with the approval of the comptroller general, sends to the treasurer, authorizing him to make payment. Like any other mere power, it is revocable while it has not been carried into execution.

2. It may be that the governor alone cannot revoke it. But undoubtedly the state can. There would seem to be much reason for holding that the governor retains power over the public money, to preserve it until it is actually paid out. After issuing a warrant he may discover that he has erred or been imposed upon. He may have been grossly defrauded. To deny him power to revoke his warrant, or to prevent payment by a counter-order, would be to cripple his department. He is undoubtedly invested by law with a discretion in issuing warrants. He can be put under no direct compulsion to issue. Then why may he not be trusted by law to recall any that may be issued improvidently? But the power of the state itself is represented by the governor and the general assembly together, in measures of legislation. And the warrants now in question have been virtually revoked by the joint resolutions above referred to. The treasurer, by these resolutions, is instructed not to pay them. The reasons that moved to this action are not set forth, further than that a joint committee had investigated the subject and reported adversely to the warrants. We are bound to presume, as the tribunal was competent, that the decision was right. We

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cannot, as a court, admit the possibility that the tone of Georgia, in dealing with a case of state duty or state obligation, is lower than that of those governments whose example is so forcibly presented by one of the learned judges of the court of claims, in Brown's case, 6 Nott & Hunt., 171.

3. Unless the element of contract was in the warrants themselves, and we have said it was not, whether they should live or die was for the state to decide. We think a legislative direction, by joint resolution approved by the governor, not to pay them, is to be complied with by the treasurer; and that the judiciary should not command him by *mandamus* to do otherwise.

Judgment affirmed.

MOSES BRYAN, plaintiff in error, *vs.* RANSOME SUGGS, defendant in error.

Where the complainant brings a bill for a receiver and for the possession of land in the nature of equitable ejectment, alleging insolvency and waste, and the defendant, by answer, in the nature of a cross-bill, prays for a cancellation of the deed which he made to complainant, on the ground that the trade between the parties was the exchange of the land sued for by complainant for a tract of land in Florida, and that he was induced to make the trade by the false and fraudulent representations of the complainant, and the evidence on the question of such fraudulent representations is conflicting, and the land which complainant traded lay in the state of Florida, and defendant had never seen it, but acted upon these representations, and the Florida land turned out to be of but little value; and the jury found and decreed that the trade should be annulled and the deeds canceled, and that defendant should retain possession of his original land; and the presiding judge refused to grant a new trial:

Held, that this court will not control the discretion of the presiding judge in overruling the motion for a new trial.

New trial. Sale. Vendor and purchaser. Before Judge CLARK. Lee Superior Court. March Term, 1876.

Reported in the opinion.

Bryan *vs.* Suggs.

W. A. HAWKINS, for plaintiff in error.

GUERRY & SON ; G. W. WARWICK, for defendant.

JACKSON, Judge.

Bryan brought suit in equity against Suggs, alleging that they had traded lands and exchanged deeds, and that Suggs had retained possession under a contract for rent, but now refused to acknowledge Bryan as landlord, but claimed the land as his own, and had committed and was committing waste upon it, and prayed an injunction, receiver, etc., and possession of the land. Suggs answered that Bryan had cheated and defrauded him ; that he was an ignorant, illiterate man ; that Bryan did not read over the deeds to him ; that he represented his, Bryan's, land, which was in Florida, to be eight hundred acres, when it was but five hundred ; to be very fertile, having grape vines on it that would make five or six rails to the cut, and other similar extravagant tales ; that he, Bryan, had given a very large sum for it, and that it was worth a very large amount ; that these representations were all false ; that he, Suggs, relied upon them, and traded on them ; and he prayed for a cancellation of the deeds, the annulling of the trade, and the retention of the property and possession of his own original land. There was conflict in the testimony, but the jury found for defendant, Suggs, and that the trade be annulled, the deeds canceled, and Suggs keep his property and possession. Bryan moved for a new trial, the court below refused it, and Bryan excepted.

The court below, in his charge, put the case upon the point of whether Bryan had falsely and fraudulently misrepresented to Suggs, and thereby cheated and defrauded him into the trade. Bryan's counsel here insisted that Suggs should have looked at the Florida land, and failing to look, that he bought at his peril. We think that had the two plantations or the lands
• laid side by side or in the neighborhood of each other, the law would have required Suggs to look for himself, and then that

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the houses upon the land and its value would have been open to inspection, and both would have traded on equal terms as respects its appearance and value; but when Suggs' land was where both had access to it, and Bryan's was off in Florida, and Bryan made representations about it which were untrue, and which misled Suggs, the case is different. In such case, the questions are just where the presiding judge put the case. Were the representations made, were they false, and was Suggs misled by them? The jury having found the affirmative of these questions, the court below being satisfied with the finding, no error of law having been committed, we decline to interfere.

Judgment affirmed.

C. M. DAVIS, executor, plaintiff in error, *vs.* JAMES M. CLARK *et al.*, defendants in error.

Where complainant's bill alleged that he had sold certain lands, and taken notes for part of the purchase money; that he was induced by fraud to enter a credit on such notes without receiving proper consideration therefor; and that the defendants had combined to defeat the payment of the balance due him, and praying that the credit be corrected, and the land sold to pay the balance aforesaid:

Held, that it was error to require him to elect whether he would proceed for the purchase money or for the recovery of the land.

Equity. Practice in the Superior Court. Jurisdiction. Before Judge WRIGHT. Calhoun Superior Court. March Term, 1876.

The following, taken in connection with the decision, sufficiently reports the facts of this case:

Complainant alleged that he had agreed to take from Hawkins, as a partial payment on the balance of the purchase money due for the land bought by Clark & Hawkins, certain notes which the latter had deposited in the Bank of Americus; that said Hawkins assured him that they amounted to

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\$3,000 00, and promised to make the proper correction if there should prove to be a mistake in the amount so alleged to be due and unpaid; that, induced by these representations, he entered a credit of \$3,000 00 upon the notes; that afterwards he found that the amount due and unpaid was less than the credit given, by \$1,000 00; and that Hawkins refused to make the necessary correction. Further, that Clark transferred the bond for titles to one Bell; that Hawkins sold the land to J. Tomlinson, and made him a deed thereto; that the son of the latter was put in possession; that the place was allowed to be sold for taxes; that the son, who was in possession, bought it and took title in his own name; that all these parties took with notice, and acted in concert to defeat the collection of the balance of the purchase money.

The bill was filed in Calhoun county, where the younger Tomlinson resided; the other defendant did not live in such county.

B. B. BOWER; C. B. WOOTEN; J. J. BECK; GUERRY & SON, for plaintiff in error.

VASON & DAVIS; STROZER & SMITH, for defendants.

WARNER, Chief Justice.

This was a bill filed by the complainant against the defendants for the purpose of correcting a credit which had been made on a note given by two of the defendants for the balance of the purchase money, due by them, for a settlement of land which they had purchased of the complainant, he giving them a bond to make titles when the purchase money should be paid, on the allegations as to the manner by which said credit was caused to be made on the note, and also alleging a combination between the defendants by means of a sale of the land under a tax execution and otherwise, to defeat the collection of the complainant's debt, with a prayer that the land might be decreed to be sold for the payment of the balance of the purchase money due therefor.

On the trial of the case, the court required the complainant to elect whether he would proceed for the purchase money due, or for the recovery of the land. Whereupon, his counsel elected to proceed for the purchase money. The defendants then moved the court to strike Bell and the two Tomlinson from the bill, on the ground that they were not then proper parties to the bill, and that no decree could be rendered against them, which motion the court sustained, although during the argument of that motion the counsel for the complainant asked the privilege to withdraw the election they had been compelled to make, and to elect the recovery of the land, which request the court refused. After the names of Bell and the two Tomlinsons had been stricken from the bill, the counsel for Clark and Hawkins moved the court to dismiss the bill for want of jurisdiction, which motion the court sustained and dismissed the complainant's bill. To all of which said rulings of the court, the complainant excepted.

In our judgment, in view of the allegations contained in the complainant's bill, the court erred in requiring the complainant to elect whether he would proceed for the purchase money due, or for the land. The complainant was entitled to a hearing and trial upon all of the equitable grounds alleged in his bill, which, if true, would have entitled him to relief.

This ruling of the court, requiring the complainant to make his election, being erroneous, the subsequent orders striking Bell and the Tomlinsons from the bill, and then dismissing it for want of jurisdiction, was also error.

Let the judgment of the court below be reversed.

CARLTON B. CALLAWAY, plaintiff in error, *vs.* FREDRICK H. WEST *et al.*, defendants in error.

(JACKSON, Judge, having been of counsel, did not preside in this case.)

1. A promissory note made and due in 1866, is within the 8th section of the limitation act of 1869, and is governed by the Code.
2. That for a period, beginning after the statute commenced running, and terminating before the bar attached, the note was in the hands of the principal maker as an attorney at law, under his professional engagement to sue it to judgment against himself and his sureties, which engagement he violated, is no reply to a plea of the statute by such principal maker. It is better that the creditor be left to his remedy for the faithless conduct of the attorney, as such, than that the courts should make inroads upon the statute by admitting doubtful exceptions.

Statute of limitations. Before Judge CLARK. Lee Superior Court. March Term, 1876.

Callaway brought complaint against West, as principal, and others, as securities, on a note dated July 3d, 1866, and due on the first day of December next thereafter, for \$300 00. The precise time when the action was commenced does not appear. The acknowledgment of service was dated October 18th, 1873. West pleaded the general issue, payment and the statute of limitations. No plea appears in the record in behalf of the other defendants.

The plaintiff introduced in evidence the note sued on, with a credit thereon of \$100 00, of date September 4th, 1867, admitted to be in the handwriting of West.

The plaintiff testified that this credit had not been placed on the note either by his consent or with his knowledge; that the amount specified therein had never been paid to him.

He further offered to testify that within two years after the maturity of the note, he had placed the same in the hands of the defendant, West, as an attorney at law, to sue to judgment against himself and the securities; that West received the note under an agreement to perform this service, and for that purpose; that plaintiff supposed until within one year before the commencement of this action, that such suit had

been brought; that upon the discovery of this omission he took the note out of the hands of West, where it had remained for two or three years without suit, and placed it in the charge of other counsel for collection. This evidence was excluded and plaintiff excepted.

Plaintiff closed, and the court, on motion, ordered a nonsuit upon the ground that the evidence submitted showed the action to be barred. To this ruling exception was also taken.

LYON & NISBET, for plaintiff in error.

W. A. HAWKINS, for defendants.

BLECKLEY, Judge.

1. It was decided in 49 *Georgia Reports*, 431, that, according to the 8th section of the limitation act of 1869, the Code, unaffected by suspension acts, applied to contracts made after June 1st, 1865. The action in the present case was not brought within six years from the maturity of the note, or from the date of the credit entered in the handwriting of the principal maker. Upon the authority of the decision just cited, the action was barred.

2. The Code, it is true, provides that a fraud on the part of the defendant, by which the plaintiff has been debarred or deterred from bringing suit, makes the period of limitation run only from the time of discovering the fraud: Section 2931. According to the plaintiff's evidence, the rejection of which is complained of, West took upon himself the professional duty of bringing the action, violated that duty, and then pleaded the statute; and, it seems, that the plaintiff was ignorant, for a considerable time, that suit was not brought as he had a right to suppose it would be. There is a strong look of fraud in the showing which the plaintiff makes, and we should deem it sufficient, until answered and contradicted by counter-evidence, if it clearly appeared that the plaintiff was thereby debarred or deterred from suing on the note within time to save his action. But the statute had commenced

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to run before the fraud commenced; and, on that side we have the general rule that when the statute has once started it does not stop, except for something not under control of the plaintiff's will. On the other side is the fact that the fraud was discovered before the bar had attached. There was still time for the plaintiff to have saved his action. Why did he not sue then instead of waiting until the whole six years had run out? While this question remains unanswered, we cannot feel authorized to say that the fraud debarred or deterred him. If the matter were less doubtful than it is, we had better leave the plaintiff, as client, to get his proper redress out of the defendant, as attorney, than to trench upon the statute with an exception not quite clear.

Judgment affirmed.

**GUS BILLINGLEA, plaintiff in error, vs. THE STATE OF
GEORGIA, defendant in error.**

(BLACKLEY, Judge, was providentially prevented from presiding in this case.)

When stolen meat was found at defendant's house, and he told repeated and contradictory lies about it, and when tracks the size of defendant's were found at the smoke-house, with two smaller tracks answering to the defendant's sons, and when the tracks found had a peculiar mark, and defendant's boots had the same mark, and the defendant lived within a mile and a half of the smoke-house which was broken open, and from which the meat was stolen, and the same track was traced within three hundred yards of the defendant's house, and lost there in broomsedge in the direction of his house, and some of the stolen meat was also found at the house of defendant's son-in-law, and the meat was clearly identified as that stolen, and the discovery was made in the morning, and the smoke-house was in the owner's yard, within the curtilage of his house, and the law was fairly given in charge to the jury and no complaint made about it at all:

Held, that the evidence is sufficient to authorize a conviction of burglary in the night, although other circumstances pointed to another as connected with the burglary, especially when other tracks were found about the garden gate, and three poles for prizing were found where the logs had been prized up, and the proof was that one man by himself could not have broken and entered by such prizing.

Criminal law. Burglary. Circumstantial evidence. Before Judge WRIGHT. Baker Superior Court. May Term, 1876.

Reported in the opinion.

I. A. BUSH, by JACKSON & LUMPKIN, for plaintiff in error.

B. B. BOWER, solicitor general, for the state.

JACKSON, Judge.

The defendant was indicted and found guilty of burglary at night. He moved for a new trial on the ground that the verdict was contrary to the law and the evidence. The court overruled the motion, and the single question is, shall this court control the discretion of the presiding judge in not granting the new trial?

The facts are that a smoke-house, in the yard and within the curtilage of the dwelling house, built of logs, was broken into by prizing out two of the logs so as to make a hole large enough to enter and steal the meat. Five hams and five middlings, worth \$2 50 a piece, and three shoulders, worth \$1 75 a piece, were stolen. There were three poles by which the logs seemed to have been prized up, and three sets of tracks near the smoke-house; one was a large track, eleven to twelve inches long, and the others were smaller, seven or eight inches long; there was also a track at the garden gate, about which some one, from the tracks made, seemed to have been standing. One of the tracks at the smoke-house had a peculiar mark, and was traced to within three hundred yards of defendant's house and was then lost in straw-sedge. This was the large track, and the size and peculiar mark corresponded with defendant's boots. The smoke-house was discovered in the morning. On going to defendant's house to search, two hams were found, identified to be part of those taken from the smoke-house. Defendant said they were his;

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that they were the hams of a large hog that he had himself fattened and killed; that the reason he had not hung them up was, that he had put them aside for summer; he was asked if his hog was deformed, as one ham was larger than the other, and both taken from the left side of the hog. He answered only by raising his face to heaven and claiming the hams. He told various other inconsistent stories about the meat, and finally endeavored to palm off the burglary upon one Cochran, who, he said, gave him the two hams for letting him stay with him awhile. During his conversation about the hams, his wife asked him why he did not tell the whole truth, and he replied that he could tell his own tale. Defendant lived a mile and a half or two miles from the smoke-house, and had two sons not fully grown living with him. Some more of the meat, thoroughly identified, was found at the house of defendant's son-in-law. It was also in evidence that one man could not have prized up the logs and broken into the smoke-house.

This court has held that the possession of stolen goods unaccounted for, while sufficient to convict a defendant of larceny from the house, is not sufficient of itself to convict of burglary. But in this case some of the meat was found at defendant's, some at his son-in-law's; the large track at the smoke-house with its peculiar mark, called a crean, at the heel, corresponded with defendant's foot, while the two smaller tracks might well fit the feet of his two boys; and the larger track, notwithstanding the rain and softness of the ground, was traced to within three hundred yards of defendant's house, and could not be traced further, though going directly towards his house, on account of the field of straw. These facts taken in connection with his lies, in our judgment, authorize the verdict.

The effort to put the burglary upon Cochran is from defendant's own lips, and unsupported by tracks, or size of Cochran's foot, or anything else, except that he, Cochran, had been seen in the neighborhood. Besides, Cochran might have been present on the watch at the garden gate, or otherwise aiding and abetting the burglary; but this does not show that

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defendant was not also present, and engaged in it. The offense was evidently committed at night; nobody would have attempted it on a smoke-house, so near the dwelling and with the family in it, in the day time; nor could it have been done in the day without the knowledge of the family. Besides, the evidence tends to show that it was discovered on the following day, in the forenoon. The jury passed upon the case, the presiding judge was satisfied with their verdict, and we will not control his discretion in overruling the motion for a new trial.

Judgment affirmed.

THOMAS J. J. PATILLO, plaintiff in error, vs. JOHN M. CUTLIFF *et al.*, defendants in error.

- 1 Where a portion of a public road is assigned under sections 621, 624, of the Code, the person receiving the assignment becomes a *quasi* commissioner, is liable to the same penalties, and must be punished for neglect of duty in the same manner as a commissioner.
2. The commissioners' court, therefore, has no jurisdiction in such a case.

Roads and bridges. County matters. Jurisdiction. Before Judge WRIGHT. Dougherty Superior Court. April Term, 1876.

Reported in the decision.

R. N. ELY, for plaintiff in error.

D. H. POPE; B. B. POWER; W. T. JONES, for defendant.

WARNER, Chief Justice.

This case came before the court below on a *certiorari* from the road commissioners' court of Dougherty county. After hearing the *certiorari* the court overruled the grounds of error alleged therein, whereupon the plaintiff in *certiorari* excepted. It appears from the record that Patillo, the plaintiff in

certiorari, had a portion of the public road assigned to him to work, under the provisions of the 621, 622, 623 and 624th sections of the Code. That the road commissioners summoned him before them for neglect of duty in not working the road which had been apportioned to him, and he failing to appear, they fined him \$50 00.

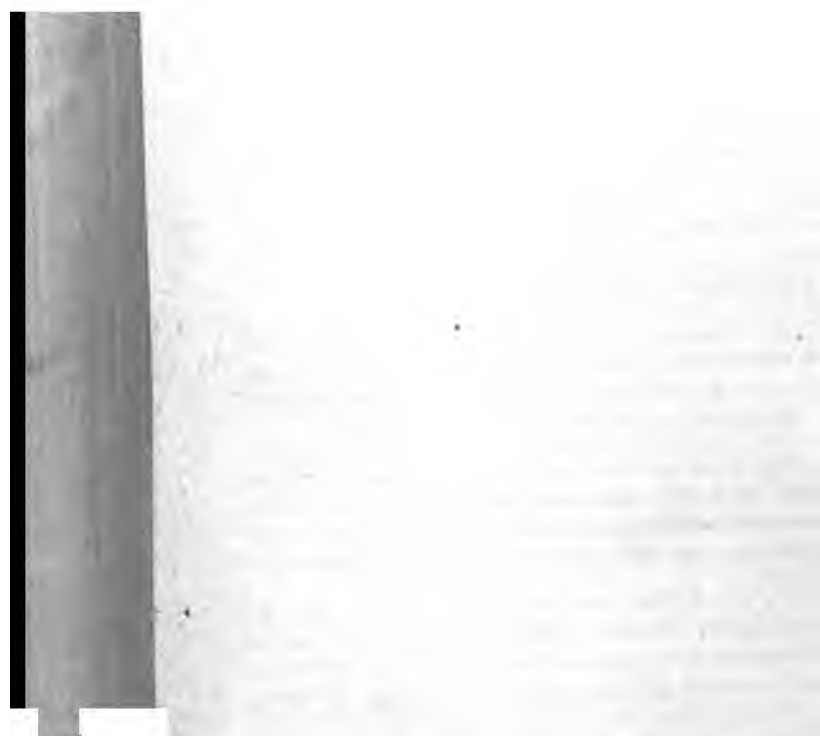
1. Whether the commissioners fined him for neglect of duty in not working the road assigned him, or for failing to appear and answer the summons, is not so clear, though it would seem that he was fined for failing to appear and answer the summons as there does not appear to have been any evidence before the commissioners that he had neglected to keep the road assigned him in good repair, and the 624th section only authorizes the penalty imposed on commissioners, to be imposed on those who have a portion of the public road assigned them, when they neglect to keep it in good repair, but their hands are liable for the usual road fines imposed on other road hands for neglect of duty. Thus it will be seen that the imposition of the usual road fines upon the hands assigned to a person, with which to work a portion of the public road, for neglect of duty in not keeping that road in repair, is one thing; the imposition of a fine upon the person who procures a certain portion of the public road to be assigned to him to work with a specified number of hands, for neglect of duty in keeping not it in repair, as is imposed on commissioners of roads for their neglect of duty as provided by the 661st section of the Code, is another and quite a different thing. In the one case the road commissioners have the jurisdiction and authority to impose the usual fines on the hands for neglect of duty in not keeping such apportioned road in repair. In the other, the person who procures and accepts a portion of the public road for himself and hands to work and keep in repair, and neglects to do so, is made liable to all the penalties and forfeitures to which commissioners are liable for neglect of duty. To what penalties and forfeitures are commissioners liable for neglect of duty under the law, and in what manner is that liability to be ascertained? The liability of road commissioners

for neglect of duty is to be ascertained by the presentment of the grand jury, and an investigation of the charge, as provided by the 661st section of the Code, and if the accusation is made out by proof, the judge shall fine the commissioners not less than \$50 00 nor more than \$200 00. Now, as the plaintiff in *certiorari* is made liable to all the penalties and forfeitures to which commissioners are liable for neglect of duty, should not his liability be ascertained in the same manner and by the same tribunal as commissioners? The plaintiff in *certiorari* was a *quasi* commissioner of the road and hands apportioned to him, and it was evidently the intention of the legislature that he should be punished as such for not keeping that road in good repair, as he undertook to do when he accepted the same.

2. The jurisdiction of justices of the peace is limited to the sum of \$100 00, and surely it could not have been the intention of the legislature to give to road commissioners a greater or more extensive jurisdiction than justices of the peace, and yet they would have, under the power and authority claimed for them in this case, jurisdiction to impose a penalty of \$200.

In our judgment, the road commissioners did not have jurisdiction to impose the penalty of \$50 00 for neglect of duty in not working the road apportioned to plaintiff in *certiorari*, but in order to subject him to the penalty, as prescribed by the 661st section of the Code, he must be proceeded against as provided by that section. Whenever the jurisdiction of a court is one of limited power and authority, and it is a doubtful question whether it has jurisdiction of the subject matter in controversy, the safer rule is to deny the jurisdiction. The refusal to sustain the plaintiff's *certiorari*, and overruling the same, was error.

Let the judgment of the court below be reversed



APPENDIX.

ON Saturday, October 9th, during the July term, 1875, of the Supreme Court, the death of Judge HENRY L. BENNING was announced by Hon. PORTER INGRAM, who, at the same time, moved the appointment of a committee to report an appropriate memorial of the deceased.

The court appointed the following committee: Messrs. PORTER INGRAM, M. H. BLANDFORD, R. F. LYON, JAMES JOHNSON, M. J. CRAWFORD, H. K. McCAY and WILLIAM HOPE HULL.

On March 17th, 1876, during the January term, 1876, the committee, through its chairman, made the following report :

At the last term of this court, the death of Judge HENRY L. BENNING was announced; and thereupon the undersigned were appointed a committee to prepare a memorial of his life and character, to be entered on the records of this court. And now, having discharged that duty, they present the following report :

Another one of the judges of this court is dead. Once more the judicial robes have given place to the winding-sheet and the pale habiliments of the grave. From this brilliant earthly tribunal, one more judge has gone down to the dismal confines of the narrow house; and from rendering judgments for others and subject to the errors of humanity, he has gone to receive judgment from that higher tribunal where no errors can be committed.

Judge HENRY L. BENNING is no more. He has passed beyond our earthly vision, but in our memories he still has an abiding place; and before this tribunal, where most of his labors were performed, we come to-day to offer to his memory the sincere tribute of our love and esteem; and let it go down to those who may come after us along with the record he has made for himself in this court.

Judge BENNING was no ordinary man. He has left a bright record in this court that will go down to the latest posterity. He would have been a marked man in any country and in any age of the world. He was born in Columbia county, Georgia, in 1814; was educated at our State University; was admitted to the bar in 1834; was elected solicitor-general of the Chatahoochee Circuit in 1838. For the last forty years of his life he resided in the city of Columbus, where he died on the 8th of July, 1875, at the age of sixty-one years.

He was elected judge of the supreme court of Georgia in 1853, when not quite forty years of age, and probably the youngest man ever elected to that position. He served in that capacity for the full term of six years, and then resumed the practice of his profession, and continued in it till the day of his death.

Of his career as one of the judges of this court we need not speak, more than to say that he passed through the ordeal of six years service, and retired

with the reputation of having been an able and an upright judge, with character unspotted, and without the suspicion of taint upon his judicial garments. We will enter into no comparison with him or others, either living or dead, who have held that high position. We leave it for posterity to pass judgment upon each according to the record that each may have made for himself, when finally made up. But what higher eulogy need we crave for our deceased friend than this: that at an early age he was elected one of the judges of the supreme court of Georgia, that he was selected from the entire bar of the state to fill that high and responsible office. We deem it a distinguished honor. It is the highest judicial tribunal in this great state. The fortunes and the lives and the liberties of more than a million of souls are within its keeping, and subject to its final arbitrament. In dignity and responsibility it is above the executive, and in power and in influence it transcends the legislative department of the government. Already governors have taken an upward step, and accepted the position; and senators need not feel degraded by an aspiration for the same dignity. A seat upon such a tribunal is a prize worthy the ambition of any member of the bar. This court was first organized just thirty years ago. Confidence in its stability and usefulness has not abated. Time has neither dimmed its lustre nor paralyzed its energies. And for the preservation and perpetuation of this great central tribunal, all hands should join and all hearts should unite. Thirty years on trial! And during that time, and within this temple, eighteen different judges have presided, as follows: LUMPKIN, WARNER, NISBET, STARNES, BENNING, McDONALD, JENKINS, LYON, STEPHENS, WALKER, HARRIS, BROWN, MCCAY, LOCHRANE, MONTGOMERY, TRIPPE, JACKSON, BLECKLEY. These are the eighteen names of judges who have been from time to time during these thirty years, selected from more than a thousand lawyers in the state, to wear the judicial robes and preside in this high tribunal. At home or abroad, need any Georgian blush at the mention of these names—at this roll call? Will any one say that the character and the dignity of the judiciary of Georgia has not been fairly illustrated, and sustained, and advanced, in the lives and by the labors of these eighteen judges? We come not here to-day merely to eulogize either the living or the dead; but we come to speak of them according to the record, as we find it, and as already made up. Though commissioned to speak of the dead, we come at this anniversary, at the end of thirty years, to inspect the records of the past, both of the living and the dead; and we assume the right to speak for the entire bar of this court, and in their name to say that, for these thirty years of the existence of this court, we find no blotch upon its records. We find them clean, uncontaminated, and white as snow. Upon these judicial robes there has come no stain. As they were thirty years ago when first placed upon the members of this court, so we find them to-day, pure, spotless, and undefiled. And in the name of the bar and of the people of the state, we give thanks that it is thus. For if this high tribunal shall ever degenerate, it will be because the bar has **degenerated**. If it should **ever** become corrupt, it will be owing to the corruption of the bar. If it should ever become venal, weak, or imbecile, it will be on account of the venality, the weakness and the imbecility of the lawyers of the state. Such

a consummation we will not anticipate. The curtain between us and the future we would not raise if we could; but if this court should ever go down, we predict that the rights and liberties of the people will go down with it. And let our motto here and everywhere be, in reference to this court, "*esto perpetua.*"

The individual members of the court may die, but the court still lives. Of the three who presided at its first organization, only one survives. He witnessed its organization thirty years ago, and he is 'here to-day as the chief justice of this court to sign the records at the close of the first thirty years of its existence.

Of the eighteen judges of this court, six are dead—LUMPKIN, NISBET, STARNES, McDONALD, STEPHENS, these went before, and now BENNING has followed them. Of the members of this bar of thirty years ago, the dead outnumber the living. In the coming years when the curious student shall read the decisions of the different judges of this court, he may want to know something of the *man*, who he was, when and where did he live, who were his associates and contemporaries, and what manner of man was he. Soon after the death of Judge BENNING, there was a meeting of the bar of Columbus, and what was said of him on that occasion, by the writer of this, is accepted and adopted by us as a part of this memorial, as follows:

General BENNING is dead! On the morning of the 8th of July last, the sad news, like an electric current, was conveyed from mouth to mouth, throughout the city and surrounding country, that "General BENNING was dead." All were astounded, shocked, and grieved at the sudden announcement. For on the morning before they had seen him on his way to the courthouse, walking the street with his accustomed stately tread, with his books and brief in hand. But alas! it was his last brief! He had labored on it nearly all the night before. It was a case in which he felt a great interest, and all his great energies were concentrated upon it. But his physical strength was not equal to the pressure, and he fell by the way, weak, exhausted, paralyzed! The giant in strength had become in a moment like an infant, helpless, and unconscious of his own situation. He sent word to the court that he "would be there after a little." With the last flickering light of his great intellect still lingering upon his brief and the case in hand, he fell, fell literally "in harness," fell after the labor of more than forty years in the profession which he loved so well, and around which he had shed an undying lustre. But he fell not among strangers. He was in the midst of friends, who conveyed him with tender care to his home. All that friends and family and medical skill could do, was done for his relief. But his appointed time had come. The silver chord was breaking; and like an unconscious infant in its cradle, the strong man was laid upon his bed for his last sleep. He scarcely spoke afterwards. Late in the evening of that day I saw him for the last time; then unconscious, speechless, and sleeping profoundly; and thus in the midst of family and friends, and in the shadows and stillness of the midnight hour, and without pain and without a struggle, he quietly and peacefully passed away. To the call of his name upon these earthly court dockets he will respond no more. In these halls we have long been accustomed to see

him and to hear his voice; we miss him in his accustomed place. There is an empty chair and a vacant desk. Others must hereafter occupy them! The tokens are so numerous, the signs around us are so real, that we are forced to the solemn realization of the announcement that "General BENNING is dead!"

And he was buried out of our sight.

It sometimes happens that the last funeral rites bestowed upon the dead give some indication of the estimation in which they are held in the community where they have lived. It was on a beautiful Sabbath morning when our friend was buried, and Columbus, in all its history, has never witnessed such a numerous multitude of sorrowing citizens in the funeral train of any of its dead. The grief was universal. All classes participated in it. The high and the low, the rich and the poor, black and white, all denominations and associations, religious, social, and military—all with heartfelt sorrow joined the solemn train as it moved towards the final resting place of their friend. And I feel that I shall neither wound the feelings of the living nor do any injustice to the memory of the dead, when I say that no citizen of Columbus has ever gone down to his grave so sincerely, heartily, and universally honored, respected and beloved as was General BENNING.

What manner of man was he thus to have won the esteem and to have entwined himself around the affections of all classes of men? His reputation among men was all of his own making. He belonged to no one of the numerous associations of the present day. He relied not upon any ancestral fame to elevate himself above ordinary mortals. He never resorted to any trick, or artifice, or disguises, to win his way to the love and admiration of his fellow-men. In all his ways he was ever simple, earnest, truthful and straightforward, and at the same time manly, courteous and dignified. The strength of a giant and the simplicity of a child were never more harmoniously blended together in the same person. At the time of his death he was over sixty years of age. He was educated at our own State University, and graduated with the highest honors of his class, showing thus early in life something of that laborious research and indomitable energy that characterized his maturer years. For more than forty years he was a member of this bar, and at an early age he was elected solicitor general of this circuit, and discharged the duties of that office with distinguished ability. And at the early age of forty he obtained the highest honors of his profession in this state by being elected judge of the supreme court; and in that high tribunal he served with great distinction for the full term of six years. In the Georgia reports may be found the result of his labors as a judge. That part of his life's record has been made up, and there it will stand forever! To that record his friends point the present and coming generations as "foot-prints on the sands of time," for information as to his character and ability as a judge.

He resided in this city, and was a member of the bar for more than forty years; and some of us have known him all the way along through those years, from the beginning to the ending of his professional career. As a lawyer, he had but few equals. To his profession he consecrated all the labor

and energies of his life. His great success was the result of careful, patient and incessant labor. For success in his profession he sacrificed everything else except honor. Neither social pleasures, nor family ties, nor personal interests were sufficient to seduce him from the supreme business of his life, to gain renown as a lawyer. In this he was successful, for he was a great lawyer, and had but few superiors. His great superiority over others consisted in thorough preparation. The order of his mind was neither quick nor brilliant. He was not what the world usually calls a brilliant or a captivating popular orator. But before a court and jury his clear statement of facts, his solid logic and earnestness of style, combined with his own convictions of right, rendered him almost irresistible. His style as an orator was all his own. He imitated nobody; he borrowed from nobody; to all the borrowed arts and graces of oratory he was totally indifferent. In his addresses he seemed to have no thought of himself or his style. His whole energies were concentrated upon the subject in hand. He was cool, deliberate, clear in statement, honest in his convictions of right, sternly logical, always in earnest, and at times vehement and truly eloquent.

But there was an interregnum in his professional life. For four years his briefs were all laid aside, and the sword was substituted in their place. When the war commenced he had scarcely ever drawn a sword or shouldered a musket. He was among the first to volunteer, and among the last to surrender at the Apple Tree. First a private, then a colonel, and before the final surrender he was a brigadier general. Whilst a soldier, his whole energies were consecrated to the work before him. He went to the front to fight! His convictions that he was fighting for a just cause were strong and irreversible, and he staked his life and his fortune on the result. His blood was freely shed, but his wounds were all *in front*. Soldiers loved him because he was brave; officers respected him because he was vigilant and just, and true to duty. The world admired and applauded him because he was ready to sacrifice life and fortune on what he deemed a just cause. And finally, with honor all bright and untarnished as a soldier, he laid aside the sword and again took up his briefs. Forty years a lawyer and member of the bar! And who, during all these years, have been his contemporaries and competitors? Who are these with whom he associated and wrestled and contended, and where are they to-day? I speak only of the dead. Thirty of them went before him. He had mingled with them in these halls; and one by one they have passed away, and he, in his turn, has followed them. And these are their names, as I remember them: WILLIAM DOUGHERTY, SEABORN JONES, WALTER T. COLQUITT, ALFRED IVERSON, G. E. THOMAS, JOSEPH STURGIS, R. B. ALEXANDER, M. J. WELLBORN, HINES HOLT, WILEY WILLIAMS, S. A. BAILEY, P. T. SCHLEY, JOHN SCHLEY, A. H. COOPER, A. MCDUGALD, JOHN A. JONES, C. J. WILLIAMS, THOMAS WATSON, J. M. GUERRY, J. N. RAMSEY, W. P. RAMSEY, P. H. COLQUITT, SEABORN BENNING, W. N. HUTCHINS, E. GOLIGHTLY, — CARUTHERS, R. W. DENTON, JOSEPH ECHOLS, W. B. PRYOR, J. A. CAMPBELL, W. L. JETER. Many of these were eminent men in their day, and able lawyers. I have known them all, and among them all, in my judgment, General BENNING had no peer as a

lawyer. Some of us have seen all of these thirty, now dead, as they passed over the stage while living. All of these we have seen in life, contending in intellectual strifes with our friend HENRY L. BENNING. We have seen them in the midst of social enjoyments, in high debate, in sparkling humor and moving eloquence, as well as in the bitter repartees and passionate episodes engendered by the antagonistic interests represented by them. This procession of the dead we have witnessed. But "dust unto dust" was the decree, and the thirty died; and at last our friend died also. The attorneys, with their clients, judges and jurors, witnesses and officers of court, all have gone down to the earth together, and the poor, worldly goods about which they contended, have perished with the litigants; all, all together are but dust!

But there are thirty others of us still living; and as we have seen the procession of the dead, so are we just as surely organized, and are moving on and on to the same destination; but the orders of this procession—who first and who last in it, thank God, is hidden from our eyes. That curtain we would not raise if we could.

A monument would you erect to General BENNING? Brass is not durable enough, marble is not white enough! Let the sterling traits of his character, as stamped upon the memory of his countrymen, stand as his monument. Truth, integrity, courage, moral and physical, unimpeachable veracity, honor and honesty untarnished, all these were eminently his, and these will endure forever; and let them stand as an imperishable monument to the memory of an honest man.

The court ordered the report spread upon its minutes.

On Friday, September 15th, 1876, Messrs. N. J. HAMMOND, JOHN COLLIER, C. PEEPLES, R. H. CLARK, B. H. HILL, committee appointed by the superior court of Fulton county, to prepare a suitable memorial of Hon. JAMES M. CALHOUN, asked that the proceedings of said superior court be entered on the minutes of the supreme court, which was so ordered.

The memorial was as follows:

"The recent death of Hon. JAMES M. CALHOUN, so long associated with us in the offices of generous friendship, and professional brotherhood, has left a vacant place in our ranks and hearts, which cannot easily be supplied.

His surviving brethren, family and friends, will long dwell with melancholy fondness upon his virtues.

His valuable life was for the greater part passed in our midst, and it would seem to be a useless labor to recall the striking characteristics, incidents and acts of his extended career, but as biography holds perhaps the best place in the philosophy of history, it cannot be otherwise than of value to the present constitution of society in our city and surrounding country, to pass in review the many points of interest connected with the life and service of this noble-hearted gentleman and honest citizen.

So indispensable was each interwoven with the other, that the history of Colonel CALHOUN and his cotemporaries, is for the greater part, the history of

DeKalb and Fulton counties and of the city of Atlanta. The impress of his hardy, self-reliant character has had much to do with their elements of growth and progress.

He was born on the 12th day of February, 1811, in the Calhoun settlement in Abbeville District, South Carolina. The moderate circumstances of his family only enabled him, in his early years, to receive a very limited education. His mother, a lady of rare Christian virtues and great perseverance, trained her children to honor Christianity, love truth, and practice industry. Both his parents were members of the Presbyterian church. It was his misfortune when about fourteen years old to lose his father, and there being but little property left for the support of the family, he labored with unremitting industry for four years upon the plantation to sustain them. At this time his mother died and the family separated. When he had attained the age of eighteen he set forth unfriended and without a cent, to make his way in the world, and to reach the residence of his oldest brother, Dr. E. A. CALHOUN, at Decatur, DeKalb county, Georgia. A short distance on his way he procured from a relative a small sum of money, with which he reached his brother's house, who generously boarded and clothed him for two years, during which time he attended the school of Col. DAVID KIDDOO, an excellent teacher, at Decatur. In after years, when he occupied an independent position, those to whom he became indebted in youth were not forgotten.

He met his pecuniary obligations thus contracted, and to the day of his death he was pleased to acknowledge these debts of gratitude to the friends of his youth, which he felt he would never be able to repay. He acquired at school an ordinary English education, together with a tolerable knowledge of the Latin language. Having attracted the friendship and attention of the late Hon. HINES HOLT, that gentleman offered him the means to gratify his long cherished wish of coming to the bar by taking him into his office, and proposing to defray his expenses while engaged in study.

He was admitted to the bar on the 22d of February, 1832, and entered at once upon a flattering practice, in which he was constantly engaged as long as his health would justify. His reputation as a collecting lawyer filled his hands with business, of which he probably transacted as much as any lawyer in this part of Georgia. Both on the civil and criminal side of the court he occupied for many years a prominent position as counsel and advocate.

As a lawyer, he was watchful, energetic and faithful. We remember no professional man in his day who surpassed Colonel CALHOUN in these honorable characteristics. Whilst never brilliant or what might be regarded a genius, Colonel CALHOUN had those better qualifications of talent, never-ending perseverance, unimpeachable integrity and good faith in all of his professional and private engagements. Kind, unpretending, and social in feeling, he was always ready to give ear to the cry of distress, and manly enough to boldly assert the right.

In 1832 he was married to Miss DABNEY, daughter of ANDERSON DABNEY, of Jasper county, Georgia, an accomplished lady, with whom he lived in great confidence and affection for more than a quarter of a century. Of this marriage there were born to him seven children, for whose welfare and edu-



cation the best years of his life were devoted. Losing his first wife on the 18th of February, A. D., 1860, in December of the same year he married Mrs. AMELIA HOLT, (formerly HIGHTOWER,) of Thomaston, Georgia, widow of Colonel T. P. HOLT. She survives to mourn his loss and to honor his memory.

In 1836 he was elected captain of a company of mounted infantry from DeKalb county, and went to the Creek war. In this service he distinguished himself for prudence, cool and resolute courage. Left at one time in command during the absence of Major J. C. ALFORD, and learning that a hostile band of Creeks was near his camp, he mustered from the battalion about eighty men, boldly met the savages, and sustained one of the most fierce attacks of that service. His little band encountered near four hundred warriors and drove them back nearly a mile, when it became apparent that the ammunition was giving out, and despite all his efforts to rally them, his command retreated in some disorder. Having to advance toward the enemy some distance beyond his company to obtain his horse, the firing upon him became so fierce that he was unable to mount, and was compelled to lead the animal through an open space some distance before rejoining his troops, thus affording the Indians a fair opportunity to cut him down, but he escaped, losing about one-third of his force killed and wounded. The loss of the enemy was much greater.

In 1837 Colonel CALHOUN was elected to the legislature from DeKalb, by a handsome majority over a large party majority on the other side. In 1850 he was elected a member of the convention of that year by a very considerable majority.

From 1837 until the war, he took an active part in politics—was twice run for congress in a district largely against him in political sentiment, reducing the majority each time nearly one-third, though opposed by popular candidates. In these contests he was the standard-bearer of his party only, and was made a candidate against his wishes, to give strength to the general conflict on his side.

Such was the personal vigor of his character that these defeats did his popularity no harm, as he never made a race of his own seeking without success. In politics he was an old line whig, though opposing a tariff for protection. Individually, he was a man of deep political conviction. Conservative in all his private acts, he died without regrets on account of his record.

Colonel CALHOUN was a member of the celebrated legislature of 1855-6, as senator from Fulton, and was the author of many of the most important acts of that distinguished body. He participated as a member of the judiciary committee in perfecting the many beneficial changes made during that session in our statutes. He was the author of the act "To define the liability of railroad companies," the act "To simplify the method of carrying cases to the supreme court," the act "To incorporate the Air Line Railway Company," the act "To take new bail in criminal cases," and several others of importance.

In 1859 he was one of the vice-presidents of the convention which nominated Bell and Everett for president and vice-president of the United States.

In 1862-3-4-5, he was mayor of the city of Atlanta. In 1862 he was appointed civil governor of the city by General BRAGG, but declined to act; and

in 1864, during the stormy period of the siege and occupation of the city by the federal army, when the Confederates evacuated the place, the unpleasant duty of surrendering Atlanta to General SHERMAN devolved upon him. No one can fairly feel or accurately describe the bitterness of his sorrow as he saw the aged, the feeble, and the helpless, laboring under the crushing weight of the exactions, robbery and terror to which our afflicted people had to submit during the occupancy and afterwards.

His letter remonstrating against the order of General SHERMAN expelling the women and children from the city during the hard fall of 1864, will live in history and carry his name to posterity as a man of true courage and generous sensibility. The letter of General SHERMAN, in answer, in which occurs the expression, "War is cruelty, and cannot be refined," conveys but an imperfect idea of the feeling of indifference and revenge with which our sufferings were viewed, and of the temper with which the faggot was applied to our cherished homes and rising city.

Colonel CALHOUN, in the midst of the sea of fire around him, did what he could to support the weak and to aid the suffering. One of this committee, who was often in official conference with him during the siege, can bear testimony to the honor and feeling with which he discharged his high trust, during those days of peril and nights of horror. As the city sank amid the lurid glare of incendiary war, its mayor stood like Marius, looking in gloom and powerless despair, upon its dying embers. It is a matter of sincere congratulation to know that he was spared by Providence to see the city of his choice and his love arise from its ashes, and again put on the beautiful smiles of peace and prosperity; that from the tears and sorrow of its thousands of victims of undeserved wrong and oppression the grand proportions of opulence and refinement have returned to cheer and bless his and their descendants.

For years past his health has been feeble, and his place vacant in the court house, but his love for his brethren and his attachment to the chosen vocation of his early life remained to the end.

As a public speaker he was earnest, careful, often vehement and impassioned. The latter, however, were exceptions to his style. He argued to convince the understanding rather than to please the fancy. As models for imitation, the zealous pursuit of his purposes by honest means, and the reliant manhood of his nature, are worthy of public notice. In private life he was gentle, truthful and courteous, without the tinsel of attractive display in company, which is possessed by some; he won the confidence of those around him by his refined feelings and attention to time, place and person, so well that few forgot a first interview with him, or ceased to regard him with esteem and respect. His life, taken altogether, was an eminent success, and he left the world with friends, relatives, and a great city to mourn his loss.

RESOLUTIONS.

Resolved, That in the death of the Hon. JAMES M. CALHOUN, the court and bar of Fulton county, the city of Atlanta and county of Fulton, have sustained a great and deeply felt loss.

Resolved, That the members of this bar, recurring to his life of usefulness as a lawyer, and a lengthened association with him as a brother, will cherish

with heart-warm feelings the remembrance of his social virtues and his generous example.

Resolved, That we deeply sympathize with his numerous and afflicted family in this sad bereavement, and tender them our condolence under its trying ordeal.

Resolved, That the presiding judge of this court be asked for permission to place these proceedings upon the minutes of the court; that the clerk be requested to furnish a copy to the family of our beloved deceased brother, and that the city papers be requested to publish the same."

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7. Limitations, statute runs to time when amendment making new case was made. *Kimbrow & Morgan vs. Va. & Tenn. A. L. R. Co.*, 185.
8. Amendment making case inconsistent with original bill, demurrable. *Ansley & Co. vs. Glendenning, adm'r*, 286.
9. Discretion imposing costs on party seeking to amend, not controlled unless abused. *Renew vs. Redding, assignee*, 311.
10. Libel, suit for not amendable by adding count for trespass to person, especially if action for trespass be barred. *Ransone vs. Christian*, 351.
11. Terms upon which party proposing to amend is to be placed, should be stated at time, and should not extend beyond continuance of case, or payment of costs, etc. *Ibid.*
12. Motion for new trial is amendable. *Powers et al. vs. Sav., Skid. & Seaboard R. R. Co.*, 471.
13. Nominal party sues for use of real; declaration amendable by striking out former. *Wilson vs. First Presbyterian Church*, 554.
14. Verdict or consent decree cannot be amended on suit at common law for fees so as to cover same. *Lester et al., administrators, et al., vs. Mathews*, 655.

ARREST. See *Criminal Law*, 8-10.

ASSIGNMENT. See *Debtor and Creditor*, 3, 5, 6.

ATTACHMENT.

1. Cotton delivered by debtor to agent of factors to be carried to warehouse, lien at once attached, and is superior to attachment levied whilst in process of transportation. *Burrows & Williams vs. Kyle & Company*, 24.
2. Bankruptcy, attachment levied within four months of, dissolved; lien not revived by general judgments thereafter obtained. *London, assignee, vs. Blandford & Garrard*, 150.
3. Purchase money, attachment for, not levied by garnishment or otherwise, on property not described in affidavit. *Reid vs. Tucker*, 278.
4. Traverse of plaintiff's affidavit not waived by pleading to the merits. *Parker vs. Brady*, 372.
5. Traverse tried either before or with the main case, unless continued for cause when main case is ready. *Ibid.*
6. Enjoined at instance of persons not a party thereto, attachment will not be, unless proceeding to his injury, and under circumstances which would authorize equity to interfere. *Williams vs. Stewart et al.*, 663.

ATTORNEY AND CLIENT.

1. Bill filed by debtor as trustee for children, to enjoin creditors, and fund brought into court for distribution, counsel for trustee not entitled to fees out of general fund. *Ball, administratrix, et al., vs. Vason, trustee, et al.*, 264.
2. Fees of counsel not included under terms costs and expenses. *Ibid.* See *Lester et al., administrators, et al., vs. Mathews*, 655.
3. Fees to be paid out of proceeds of suit; attorney has inchoate lien from commencement of action, which cannot be defeated by dismissal by client over objection of attorney. *Twiggs et al. vs. Chambers*, 279.
4. Justification pleaded to action for libel, defendant entitled to open and conclude; nor is right forfeited by fact that he withdrew plea at be-

- ginning of trial and did not renew it until plaintiff had made out *prima facie* case. *Ransome vs. Christian*, 351.
5. State legal positions to jury, counsel may. *Ibid.* See *Warmock vs. State*, 503.
 6. Discretion of court in discharging rule against attorney for failure of his client to perform decree in equity, not controlled. *Gray vs. Culbertson et al.*, 470.
 7. Honest belief of attorney that money collected for his client was his own, not such "good cause" as will relieve him from the payment of twenty per cent. from time of demand. *Hawkins vs. Smith, trustee*, 571.
 8. Release property from judgment, attorney to sue and collect claim has no authority to bind client to. *Phillips vs. Dobbins*, 617.

BAIL. See *Principal and Security*, 6-7.

BANKRUPT.

1. Assignee of bankrupt has right to be made party to rule to distribute fund in hands of receiver under process of state court. *Loudon, assignee, vs. Blandford & Garrard et al.*, 150.
2. State court will distribute fund in accordance with bankrupt law. *Ibid.*
3. Attachments on property, sale of which raised fund, if levied within four months of adjudication, lose priority. Lien not revived by general judgments thereafter obtained. *Ibid.*
4. Distress warrant levied before adjudication paid out of proceeds of property. *Ibid.*
5. Justice's court judgments obtained before adjudication, paid. *Ibid.*
6. Mechanic's lien properly recorded and sued by attachment within twelve months, and not sued again after dissolution of attachment because of bankruptcy of defendant, ranks from date of lien. *Ibid.*
7. Costs of officers of court and commissions of receiver, first paid. *Ibid.*
8. If any of claimants be entitled to whole fund after assignee is heard, latter's interest is at an end, and claimants may divide among themselves and others as they see proper. *Ibid.*
9. Assignee having bill filed in United States court to set aside sale which brought fund into state court, must first dispose of that case before he can claim. *Ibid.*
10. Judgment proved in bankruptcy, lien otherwise had is waived. *Heard vs. Jones*, 271.
11. Collateral provisions as to relation of husband and wife, or of parent and child, in state exemption laws, form no part of bankrupt system. *Farmer vs. Taylor et al.*, 559.
12. Exempted property, bankrupt's title to is not affected by adjudication or subsequent proceedings. *Ibid.*
13. Discharge bars claim of creditor, though name was not placed on schedule nor notice given to him personally, publication in newspapers having been made. *Heard vs. Arnold & DuBose*, 570.

BANKS. See *Corporations*, 1, 2, 9.

BONDS.

1. Official bond, though not conditioned as statute prescribes, considered as if executed in conformity thereto. *Smith, governor, for use, vs. Taylor et al.*, 292.

2. Ordinary, whatever terms of bond, yet held to be for performance of duties as clerk of ordinary. Therefore it cannot be sued for failure to take security from tax collector. *Ibid.*

See *Principal and Security*.

BONDS FOR TITLE. See *Vendor and Purchaser, 1-5*.

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CERTIORARI. See *Practice in Superior, City, and County Courts*, 11, 13, 15.

CHARGE OF COURT.

1. Inapplicable to facts, charge should not be given. *Wagner, guardian, vs. Robinson*, 47.
2. Charge that judgment attacked for fraud may be good in part though fraudulently obtained as a whole, not damage party, if jury find no fraud and sustain entire judgment. *Sindall et al. vs. Thacker & Co. et al.*, 51.
3. Aiding to escape, on trial of prosecution for, error to charge that custody was legal if state's evidence is true, or that if jury believe such evidence they must find verdict of guilty. *Habersham vs. State*, 61.
4. Requests which court designs to refuse, should not be read to jury, *Ransone vs. Christian*, 351.
5. Nominal damages, law as to should be charged where any view of facts proven justify such charge. *Ibid.*
6. Libel, declaration for alleged no special damage, and none proven, that no recovery could be had therefor, should, on request, be charged. *Ibid.*
7. *Torts*, different species of damages which jury may give in, not necessary for court to go into elaborate explanation of, though requested. A distinct application of controlling principles to the facts of the particular case is what the jury need. *Ibid.*

8. Opinion expressed on evidence necessitates new trial. *DeSaulles & Co. vs. Leake*, 365; See *Warmock vs. State*, 503; *Pike et al. vs. Dotterer, trustee, et al.*, 527.
9. Admitted, what is may be repeated by court; and that admission was made, if stated in charge, taken as true unless otherwise certified. *Ibid.*
10. Erroneous charge on immaterial issue, or on irrelevant testimony, no cause for new trial unless jury was misled. *Boyd et al. vs. England*, 598.
11. Question for decision being whether debtor was insolvent at time of conveyance, error to charge that no debtor in the condition of P. could make such a gift of his property. *Primrose vs. Browning*, 369.
12. Error to charge that "under the evidence for the defense, he is guilty." *White vs. State*, 385.
13. Error to charge that "if you disbelieve all the evidence for the state, and believe every word of evidence for the defense, I charge you the prisoner is guilty, but of course you can look to all the evidence and make up your verdict on it." *Ibid.*
14. Entire charge not in record, court presumed to have charged correctly, if the contrary be not manifest from portions of charge given and excepted to. *Woolfolk vs. Macon and Aug. R. R. Co.*, 457.
15. Negligence, court has no authority to determine in charge what constitutes. *Ibid.* See *Ga. R. R. & B'kg Co. vs. Neely*, 540.
16. Oral request in course of argument, refusal not authorize new trial. *Wilson vs. First Pres. Church*, 554.
17. Property sought to be made liable upon ground that though title was taken to claimant, yet it was paid for with defendant's money, and it was replied that land was given by defendant to claimant prior to date of plaintiff's judgment; error to ignore in charge the gift and to confine jury solely to question as to who paid for property. *Bryson vs. Chisholm*, 596.
18. Evidence, none to support charge, error to give. *Minor vs. State*, 630.

CLAIM.

1. Part of purchase money paid and bond for title given; judgment obtained for balance and *fi. fa.* levied on land, deed having been first filed in clerk's office. Wife of vendee cannot set up right to have money paid by husband refunded on ground that it was hers, by claim, without proving insolvency of vendor. *Boyd vs. Chappell*, 22.
2. Part of property levied on subject and part not subject, judgment finding all subject reversed unless levy is dismissed in respect to that not subject. *Kraton vs. Tifts*, 446.
3. Successive claims interposed, pretended title being conveyed from one to the other, for purpose of delay, claimants being insolvent, and the first having been decided in favor of the plaintiff, injunction will issue. *Chappell vs. Boyd et al.*, 578. See *Crawford, executor, vs. Spurling*, 611.
4. Property sought to be made liable upon ground that though title was taken to claimant, yet it was paid for with defendant's money, and it was replied that land was given by defendant to claimant prior to date of plaintiff's judgment; error to ignore in charge the gift, and to confine jury solely to question as to who paid for property. *Bryson vs. Chisholm*, 596.
5. Claim affidavit and bond, purporting to be executed in foreign state before notary public, not received by levying officer without authentication. *Charles vs. Foster*, 612.

6. Seal of notary is not authentication; nor is certificate and seal of clerk of court of record without further certificate from judge, etc. *Ibid.*

COMMON OF PASTURE. See *Injunction*, 12.

COMPROMISE AND SETTLEMENT. See *Accord and Satisfaction*.

CONSIDERATION. See *Contracts*, 3, 5, 16, 17, 20.

CONSTITUTIONAL LAW. See *Homestead*, 1.

CONTEMPT. See *Injunction*, 1.

CONTINUANCE.

1. Counsel upon whom movant almost exclusively relied properly absent, continuance granted though court has strong reason to believe that motion was made for delay. *Bagwell vs. State*, 406.

CONTRACTS.

1. Parol evidence inadmissible to change written contract. *Sims vs. Crawford, executor*, 31.
2. Construction is for court, but it cannot decide whether work done thereunder was in capacity of mechanics. *Savannah, Griffin and North Alabama Railroad Co. vs. Grant, Alexander & Co.*, 68.
3. That deceased father, who was discharged in bankruptcy and died insolvent, owed note, not impose upon sons such strong moral obligation to pay same as to constitute consideration for new note for principal of old. *McElven et al. vs. Sloan & Company*, 208.
4. Contract to pay additional interest on account of notes not being met at maturity, made after maturity, *nudum pactum*. *Shealy vs. Toole*, 210.
5. Consideration, none on face of contract and none shown by evidence, contract not enforced, though absence of consideration be not pleaded. *Ibid.*
6. Executor takes note of member of firm which was indebted to testator, with note on third person as collateral, in payment of such indebtedness, original claim discharged. *Adams & Son vs. Reid et al.*, 214.
7. Agent, note signed by without disclosing principal, former individually bound and latter not. *Graham vs. Campbell et al.*, 258.
8. Contract described in declaration as made with plaintiff, too late, after verdict, to object that contract offered in evidence was made with plaintiff and others jointly, no plea in abatement having been filed, nor objection to testimony made. *Mahone vs. Bryant*, 294.
9. Will, contract for valuable consideration to leave legacy by, binding on representative. *Napier vs. Trimmier, administrator*, 300.
10. Producer to deliver definite quantity of charcoal each day for seven months, which consumer was to receive at the pits "in the basket," and haul to the furnace, where it was to be measured and credited to producers, at six cents per bushel, on their account for cash advances, it was right of producers to draw coal from pits at rate requisite to make stipulated delivery daily; loss resulting from consumer's failing to receive and haul away at same rate, fell on him. Hence, so long as cash advanced exceeded value of coal drawn from pits, producer had no right to abandon contract or to sue for breach. *Denman & Bie vs. Cherokee Iron Co.*, 319.
11. Contractors for building of railroad were to be paid ninety per cent. of each monthly estimate in certain bonds to be taken at eighty cents on

- the dollar, and ten per cent. retained until completion of contract; provided not more than \$25,000 00 in bonds at par should be retained as security. If contractors fail to execute contract, this amount to be forfeited. For completion of work in time and manner specified, contractors to be paid \$475,000 00 in bonds, less previous payments: *Held*, that the contract price of the work was \$475,000 00 in bonds; not the aggregate amount of the estimates, either in cash or in bonds at the agreed rate. *Sav. & Char. R. R. Co. vs. Callahan et al.*, 331.
12. The estimates and agreed rate at which bonds advanced were to be counted, were intended for use in temporary monthly settlements only. *Ibid.*
 13. Stipulation for retaining ten per cent. was in the nature of a penalty. Time was not so clearly of essence of contract as to require forfeiture. *Ibid.*
 14. Promise to pay in currency by future day, sum equal to the value of given amount of currency at date of promise, is to be discharged, after maturity, with no less currency than at maturity. Debtor only entitled to appreciation to expiration of credit. *Whitaker vs. Dye*, 380.
 15. Where a party dies pending suit, and a new party, not the legal representative, takes his place by consent, on express condition, entered of record, that his opponent shall lose no right thereby, the same evidence will be admissible as if the legal representative had been made a party. *Power et al. vs. Sav., S. & S. R. R. Co.*, 471.
 16. Trade, contract not to carry on within limits of certain town, enforced. *Ellis & Palmer vs. Jones & Co.*, 504.
 17. Contract as follows: "We, the undersigned, promise to pay the amount set opposite our several names, to be applied to the completion of the house of worship of the First Presbyterian Church in Savannah, in four equal payments, etc., interest to run from first of July next," is a promise to pay the church, and is supported by the consideration of mutual promises, and by the fact that the church entered upon the work of completing the building. *Wilson vs. First Presbyterian Church*, 554.
 18. Unless so stipulated, removal of subscriber will not bar recovery, nor will it operate as notice of withdrawal of subscription. *Ibid.*
 19. That treasurer of church indulged one subscriber, and took note therefor, without interest, not discharge others. *Ibid.*
 20. Note with security, given by agent for moneys collected, to prevent prosecution for breach of trust, not collectible. *Aliter*, if given solely for purpose of securing debt. *Godwin et al. vs. Crowell*, 566.
 21. Executive warrant on treasurer is not a contract; it is a license or power and is revocable before payment. *Fletcher, ex'r, vs. Renfroe, treasurer*, 674.

CORPORATIONS.

1. Execution against stockholder under section 3371 *et seq.*, of Code, in June, 1869, prevents bar of statute of limitations of 1869, though no levy was made until June, 1870. *Stone et al., ex'rs, vs. Davidson, assignee*, 179.
2. Notice by publication under section 3371, need not appear of record; nor that president furnished certificate, and number of shares owned by each as required by section 3373. If these facts do not exist, and the *fi. fa.* is for too much, or is otherwise illegal, remedy is by illegality. *Ibid.*
3. Equity will compel payment of sufficient per cent. of unpaid stock to meet debts. *Dal. & Morg. R. R. Co. vs. McDaniel et al.*, 191.

4. Remedy in equity more proper than *mandamus* under facts of this case. *Ibid.*
5. Capital stock subscribed, suit to collect, evidence of value of that stock or of any other, irrelevant. *South Ga. & Fla. R. R. Co. vs. Ayres*, 230.
6. Not necessary to show that certificate of stock has been tendered, or that corporation has received stock authorized, or, in absence of plea in abatement, that corporation has been organized and is still alive. *Ibid.*
7. Railroad which corporation was chartered to construct, sold to other company, unpaid stock subscription cannot be collected from the stockholders not consenting to sale. *Ibid.*
8. Calls for subscription must be clearly proved, and recovery should be limited to aggregate amount of calls not met. *Ibid.*
9. Assignment of bank executed by officers after term had expired, under authority from stockholders granted before, valid, the charter providing that if election did not take place on proper day, the corporation should not be deemed dissolved, and no election having taken place. President and cashier were officers *de facto* if not *de jure*. *Milliken vs. Steiner*, 251.
10. Assignment by bank, section 1494 of Code providing how to set aside at instance of creditors, applies only to case where there has been voluntary surrender of charter. *Ibid.*
11. *Bona fide* purchaser of railroad stock protected. *Stinson vs. Thornton, adm'r*, 377.
12. Judgment of stockholder against company set off in equity against suit under individual liability clause. *Boyd & Son vs. Hall et al.*, 563.
13. Fraud, such judgment may be attacked for, but facts must be averred and proved. *Ibid.*
14. Recovery of entire debt may be out of one, provided it does not exceed defendant's proportion, the charter providing that "stockholders shall be liable *pro rata* for the debts of said company to the amount of the stock they respectively hold." *Ibid.*

COSTS.

1. Fund to be distributed, costs of officers of court and commissions of receiver first paid. *Loudon, assignee, vs. Blandford & Garrard et al.*, 150.
2. Fees of counsel not included under terms, costs and expenses. *Ball, adm'r, et al., vs. Vason, trustee, et al.*, 264.
3. Judgment refusing new trial reversed, plaintiff in error entitled to judgment for costs incurred in supreme court. This right is not affected by instructions that new trial be refused if defendant consents to certain terms. *Turner vs. Carroll*, 456.

CRIMINAL LAW.

1. Burglary; only evidence against prisoner, that he was seen to pass by house some hours before offense was committed, and that several months thereafter goods stolen were found in his possession, sufficiently answered by proof of good character and by testimony of unimpeached witness that goods were left with prisoner in pawn for money, the latter having given substantially same account of possession. *Phillips vs. State*, 28.
2. Rape; fact that infant was under ten years of age conclusive that act was forcible. *Gosha vs. State*, 36.
3. Venue of crime must be established beyond all reasonable doubt. *Ibid.*

4. Confessions corroborated by strong circumstantial evidence will authorize conviction. *Crowder vs. State*, 44.
5. Jury, error to charge that they are, in no sense, judges of the law. *Habersham vs. State*, 61.
6. Escape from custody, on trial for aiding to, fact and legality of custody are for the jury; court should acquaint jury with rules distinguishing legal from illegal custody. *Ibid.*
7. Error to charge that custody was legal if state's evidence be true, or that verdict of guilty must be returned if jury believe evidence for state. *Ibid.*
8. Custody by private person after legal arrest without warrant, becomes illegal if protracted for unreasonable time. *Ibid.*
9. Cruel treatment by captor considered to illustrate purpose of arrest and *bona fides* of custody. *Ibid.*
10. Custody voluntarily assumed by private person without warrant, may be lawfully terminated with his consent, especially if prisoner be innocent. *Ibid.*
11. Violation of lawful custody, to render criminal, legality need not be positively known to offender. *Ibid.*
12. Actual guilt of prisoner not indispensable to legality of custody, and therefore his conviction is not pre-requisite to convicting another of assisting him to escape. *Ibid.*
13. Testimony clear that defendant was guilty of more than bare assault, not such error to refuse to charge that jury may find him guilty only of assault, as to require new trial. *Fellon vs. State*, 84.
14. Receiving stolen goods, indictment for under section 4488 of Code, should allege trial and conviction of principal thief; if facts will not warrant this, then indictment should be under section 4489. *Jordan, alias Steger, vs. State*, 92.
15. Accessory in receiving stolen goods when principal thief is only charged with simple larceny, indictment for burglary against principal inadmissible. *Ibid.*
16. Indictment should specify particular offense of which principal was convicted. *Ibid.*
17. Murder, trial for, court should not charge as to voluntary manslaughter, if there be no evidence thereof; *aliter*, if there be the slightest evidence on which to base such defense. *Wynne, jr., vs. State*, 113.
18. Attention of jury may be called by court to physical facts, such as the appearance of the pistol and cartridges, etc. *Ibid.*
19. Pistol, though fired off after rencontre, accompanied by proof of its condition after close of fight, admissible; but no experiment by firing, or otherwise, if made without defendant's consent, and after homicide, should be admitted. *Ibid.*
20. Exact condition of pistol and cartridges at close of fight may be shown; and experts may testify what such condition indicated, the jury to draw their own conclusion therefrom. *Ibid.*
21. Flight of accused and all the circumstances attending his arrest, admissible. *Ibid.*
22. If M. forge the name of P. to a letter, by which money in hands of P's bailee at Thomasville is sent to Augusta, and M., personating one C., to whom he has directed the money to be sent, takes it from the express office and appropriates it, M. is guilty of forgery under section 4451 of Code. *Mitchell vs. State*, 171.
23. Such facts sustain allegation that M's intent was to defraud P., though latter recovered the money from the express company. *Ibid.*

24. The forgery was complete when the letter removed P's money from the depository he chose for it. *Ibid.*
25. Nor is M. less guilty of forgery because he also committed the crime of personating another. *Ibid.*
26. Nor is his intent to defraud P. lessened by the fact that he also defrauded the express company. *Ibid.*
27. Dying declarations, sayings apparently in *articulo mortis* should be admitted, and question as to whether made in presence of death left to jury. *Jackson vs. State, 235.*
28. Burglary, verdict of guilty contrary to evidence in this case. Accomplice testimony, what is corroboration of, touched upon. *Bailey et al. vs. State, 314.*
29. Premeditated attack with pistol, libel, six months before, however severe and excoriating, cannot justify. *Ransone vs. Christian, 351.*
30. Newly discovered evidence that a witness will swear that she heard another admit committing the crime with which defendant was charged, not authorize new trial. *Attaway vs. State, 363.*
31. Extortion, public officers only can be convicted of. *White vs. State, 385.*
32. Extortion, for officer having in hands warrant for assault and battery, to receive money voluntarily offered by defendant, is not, if money is received for purpose of settling case, and not for officer's use. *Ibid.*
33. That officer said the warrant was for assault and battery may be proved as part of *res gesta* without producing warrant. *Ibid.*
34. Extortion, guilty intention of officer, his experience and acquaintance with his duties may be shown. *Ibid.*
35. Leading question to witness introduced by state, court may propound. *Ibid.*
36. Charge that "under the evidence for the defense, he is guilty," error. *Ibid.*
37. Charge that "if you disbelieve all the evidence for the state, and believe every word of evidence for the defense, I charge you the prisoner is guilty, but of course you can look to all the evidence and make up your verdict on it," error. *Ibid.*
38. Identity of defendant and intent with which he acts, questions for jury. *Dunn vs. State, 401. Young vs. State, 403.*
39. Offense charged clearly proved, not error of which defendant can complain for court to instruct jury that they must find verdict of guilty or not guilty, although, under indictment, verdict for lesser offense could be returned. *Ward vs. State, 408.*
40. Stabbing, under indictment for, it might be competent to convict of assault, or of assault and battery, or of an attempt to stab. *Ibid.*
41. Stabbing, to constitute, knife need only penetrate skin and draw blood. *Ibid.*
42. Stabbing, opprobrious words will not justify. *Ibid.*
43. Insanity, unless presumption to contrary is overcome by evidence, acquittal cannot be had on ground of. *Carter vs. State, 463.*
44. Question propounded by prosecution subsequently withdrawn, refusal of court to allow answer to be recorded, not such abuse of discretion as to require new trial. *Ibid.*
45. Burglary, that defendant broke and entered Savannah theatre, without allegation that valuable goods were stored therein, not sufficient. *Lee vs. State, 477.*
46. Jury, counsel may present their view of the law to, subject to charge. *Warmock vs. State, 503. See Ransone vs. Christian, 351.*

47. Burglary, evidence sufficient to convict in this case. *Mallory vs. State*, 545.
48. Punishment, discretion of court as to, not interfered with. *Ibid.*
49. Assault with intent to murder with pocket knife, that indictment did not allege use made of weapon, not good in arrest. *Ash vs. State*, 583.
50. After charging what would reduce murder to manslaughter, not error to add that in all cases of voluntary manslaughter there must be some actual assault upon the person killing, etc. *Ibid.*
51. *Nolle prosequi* is termination of case with all recognizances and incidents of that prosecution. *Lamp vs. Smith, gov.*, 589.
52. Selling spirituous liquor to minor without having obtained consent of parent, is burden of showing that retailer failed to obtain such consent on state? *Quere. Ridling vs. State*, 601.
53. Sufficient proof in this case of absence of authority of parent. *Ibid.*
54. Forged paper, to complete offense of uttering, it must not only be published as true, but also with intent to injure. *Stephens vs. State*, 604.
55. Open use of stolen property and truthful answer as to how some of it was disposed of, construction of such conduct should be submitted to jury. *Minor vs. State*, 630.
56. *Corpus delicti* less fully established than might be expected, new trial more readily granted for error in charge. *Ibid.*
57. Separation of juror from jury, ground of new trial, unless no communication with any one on subject of trial be shown. *Daniel, alias Neal vs. State*, 653.
58. Burglary in the night, evidence sufficient to convict in this case. *Billingslea vs. State*, 686.

DAMAGES.

1. Defective quality of goods sold pleaded, abatement of purchase money should be equal to difference between agreed price and actual value, and this whether purchasers lost anything or not. *Atkins & Co. vs. Cobbs*, 86.
2. Where bill claims proceeds of goods sold in Confederate transaction, error to decree for value of goods in United States currency at time when they ought to have been accounted for, instead of value of proceeds of fair sale when they ought to have been sold. *Ayers vs. Daly*, 119.
3. Malicious suit by distress warrant, action for, damage accruing after commencement of suit not recoverable. *Sturgis & Berry vs. Frost*, 188.
4. Estimate of damages in such cases. *Ibid.*
5. Expense of having stock exempted under homestead laws, not recoverable. *Ibid.*
6. Bonds, measure of recovery for default in making payment in, is actual value of same when they ought to have been delivered, with interest thereon. *Sav. & Char. R. R. Co. vs. Callahan et al.*, 331.
7. Nominal damages mean an amount sufficient to cover and carry costs; court should so charge where any view of facts would justify. *Ransone vs. Christian*, 351.
8. Libel, declaration for alleged no special damages, and none proven, court should, on request, charge that no recovery can be had therefor. *Ibid.*
9. Damages for libel not mitigated because punishable on criminal side of court, if no prosecution therefor be shown. *Ibid.*

10. *Torts*, though requested, court need not go into elaborate explanation of different species of damages allowed therein. A distinct application of controlling principles to the facts of the particular case is what they need. *Ibid.*
11. Set-off, personal injuries sustained from an assault by plaintiff may be against damages. *Ibid.*
12. Liability of sheriff for failure to levy is injury sustained by plaintiff. He may, therefore, show that property did not belong to defendant. *Cowart, sheriff, vs. Dunbar & Company et al., 417.*
13. Recoupment of damages, jury may consider shortcomings of plaintiff and defendant respectively, and make verdict accordingly. *Hill vs. Sibley, 531.*
14. Neglect to levy and sell at proper time by which plaintiff is compelled to defend bill for injunction, recovery against sheriff should cover expense of employing counsel, depreciation of property, etc. *Hunter, sheriff, vs. Phillips, 634.*

DEBTOR AND CREDITOR.

1. Payments to third person for creditor operates as satisfaction when. *Holland et al., admr's, vs. Tyus et al., 36.*
2. Creditor without lien, or title, or judgment, has not, as general rule, right to invoke injunction and receiver to prevent assignment of debtor's goods, or to deprive debtor or assignee of possession. *Johnson & Smith et al. vs. Farnum et al., 144.* See *Tufts vs. Little, adm'r, 139; Mayer & Co. et al. vs. Wood, March & Co. et al., 427; Crawford, ex'r, vs. Spurling, 611.*
3. Assignment for equal benefit of all creditors violates neither law nor public policy. *Millers vs. Kernaghan et al., 155.*
4. Assets having been attached here by garnishment, after execution of assignment in South Carolina and notice to garnishee, judgment applying *pro rata* share to claims quite as favorable as law warrants. *Ibid.*
5. Assets not held here until Georgia creditors are paid in full. *Ibid.*
6. Assignment by bank, sections 1494 providing how set aside at instance of creditors, applies only to case where there has been voluntary surrender of charter. *Milliken vs. Steiner, 251.*
7. Insolvent cannot make voluntary conveyance; nor does it matter with what intent deed was made. *Primrose vs. Browning, 369.*
8. Accommodation indorser becomes debtor from time he indorses, and not from maturity of note. *Ibid.*

DEED.

1. Conveyance for use of P., the children she now has, and those she may thereafter have, etc., while the *habendum* clause states tenure to be for P., her heirs and assigns; P. takes joint interest with children, and not fee simple. *Lee et al. vs. Tucker et al., 9.*
2. Marriage settlement; that property, with increase, shall inure to benefit of wife and such child or children begotten by the husband, creates tenancy in common between wife and children. *Carswell, executor, vs. Schley et al., 101.*
3. Subsequently apparently conflicting provisions to the effect that if the husband should die before the wife, the property, with the increase of the negroes, should vest in the wife in fee simple. That if the wife should die with or without issue, it should vest in the husband during his life, at his death one-half to be disposed of in such manner as he may think proper by last will and testament, or otherwise, to his heirs,

- etc., the other half to be subject to disposition by the wife by last will and testament, or to go to her heirs, construed as being subject to the rights of children referred to above, should any be born. *Ibid.*
4. At the death of the wife, there being two children, her third passed to the husband, one-half by survivorship and the other half as her heir-at-law. *Ibid.*
 5. The provision as to use of profits by husband referred only to time when wife was in life; at her death, he and the children became tenants in common in *corpus* and profits. *Ibid.*
 6. Witnesses to unrecorded deed, one dead and the other states that he does not recollect contents, the instrument being lost, parol evidence admissible. *Graham vs. Campbell et al.*, 258.
 7. Power authorizing agent to dispose of several tracts, recorded with deed to one, and subsequently lost; record admissible upon trial of title to other tract, to show existence of power. *Ibid.*
 8. Sheriff's deed inadmissible without *fi. fa.* *Clarke & Wilson vs. Tra-
wick*, 359. See *Irby vs. Gardner*, 643.
 9. Color of title, sheriff's deed inadmissible as, unless on case made it is relevant as such. *Ibid.*
 10. Parol, contents and character of deeds alleged to be fraudulent, not shown by without accounting for absence of instruments themselves. *Primrose vs. Browning*, 369.
 11. Parol, real consideration of deed shown by. *Ibid.*
 12. Instrument in form a deed of gift and well attested as such, but not legally attested as will, should, if doubtful in its terms as to time of vesting estate, be classed as a deed. *Dismukes, administrator, vs. Parrott*, 513.
 13. Sheriff's deed, duly recorded, admitted without justice court *fi. fa.* under which sale was made, date of sale being in 1855 and *fi. fa.* having been lost. *Irby vs. Gardner*, 643.
 14. Whether deed covered premises in dispute was for jury. *Ibid.*

DISTRESS WARRANT. See *Landlord and Tenant*, 1, 3, 5-9, 11.

DOMICIL. See *Venue*, 2.

EJECTMENT.

1. Count for *mesne* profits is such an action for money as process of garnishment may issue thereon. *Walker vs. Zorn*, 35.
2. Order granting leave to administrator to sell land obtained on published notice required by section 2559 of Code, not conclusive of there being debts outstanding, in ejectment by administrator *vs.* heir. *Aliter*, if obtained upon personal notice. *Davis, adm'r, vs. Howard*, 430.
3. Executor, to recover in ejectment, must introduce will and not letters testamentary only. *Mays, ex'r, et al., vs. Killen*, 527.

ELECTION. See *Practice in Superior, City and County Courts*, 23.

EMBLEMENTS. See *Equity*, 22.

EQUITY.

1. Doubtful construction of marriage settlement involved, defendants having remotely possible interest properly made parties. *Carswell, ex'r, vs. Schley et al.*, 101.

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2. Account, bill for, not turned by amendment into action for breach of warranty of goods sold by defendant to complainant in an accounting which took place; more especially if an action on warranty would have been barred. *Ayres vs. Daly*, 119.
3. Master, bill cannot be amended before. *Ibid.*
4. Bill claims proceeds of goods sold in a transaction when Confederate money was current, error to decree for value of goods in United States currency at time when they ought to have been accounted for, instead of proceeds of fair sale when they ought to have been sold. *Ibid.*
5. Right to rescission for fraud must be claimed before equity will treat sale as rescinded. *Johnson & Smith et al., vs. Farnum et al.*, 144.
6. Consent decree, after full execution and many years of acquiescence, not disturbed. *Freeman et al. vs. Craver, adm'r, et al.*, 161.
7. Parties, wife and children unnecessary to bill to make income of trust created for benefit of mature man, liable to his debts, he being alone interested therein. *Bailie & Bro. vs. McWhorter et al.*, 183.
8. Corporations, equity will compel payment of sufficient per cent. of unpaid stock to meet debts. *Dal. & Morg. R. R. Co. vs. McDaniel et al.*, 191.
9. *Mandamus* not most appropriate remedy under facts of case. *Ibid.*
10. Service of bill by private person with affidavit verifying same, valid. *Ibid.*
11. Dismiss bill, too late to move to after demurrer overruled, answer filed, and report of auditor in and excepted to. *Ibid.*
12. Review, bill of sustained, where whole scope of original bill was to charge defendants against whom no decree passed, and when defendant decreed against was not within purview of relief contemplated. *Bennett vs. Brown*, 216.
13. Review, whilst irregularities constitute no ground of, yet glaring defects will be regarded. *Ibid.*
14. Law, equitable defense, not bound to set up at, when. *Radcliffe & Lamb vs. Varner & Ellington*, 222.
15. Pleadings cannot be dispensed with by consent. *Cent. Bank of Ga. et al. vs. Johnson & Smith et al.*, 225.
16. Bill filed by debtor as trustee for children, to enjoin creditors, and fund is brought into court for distribution, counsel for trustee not entitled to fees out of general fund. *Ball, adm'r, et al., vs. Vason, trustee, et al.*, 264.
17. Fees of counsel not included under terms costs and expenses. *Ibid.*
18. Expenses do include funds for carrying on planting interest by receiver, commissions of such officer, etc. *Ibid.*
19. Lien for provisions furnished foreclosed and levied, but defeated by appointment of receiver, who takes possession of crop and uses same in planting, paid out of fund. *Ibid.*
20. Receiver is competent witness to prove his account, and vouchers need not be produced unless called for. *Ibid.*
21. Master or auditor, matters passed on by, not opened unless regularly excepted to. *Ibid.*
22. That defendant became purchaser of property at sheriff's sale, at less than value, under agreement to reconvey on being reimbursed, and that he has been repaid, makes case for equitable relief. *Burnett vs. Vandiver*, 302.
23. That done which ought to have been done, equity considers. *So. Life Ins. Co. vs. Kempton, adm'r*, 339.

24. Interpleader, bill of must be filed before judgment at law against the stakeholder. *Brown, adm'r, vs. Wilson et al.*, 534.
25. Case made by bill must be substantiated by testimony. If evidence make case other than that, no recovery had. *Rakestraw et al. vs. Brogdon*, 549.
26. Affidavit to bill, in attesting notary need not use seal. *Chappell vs. Boyd et al.*, 578.
27. Party collaterally interested brought in as defendant, and he prays equity in his behalf, decree should settle his rights as well as those of other defendants. *Grimes et al. vs. Little, trustee, et al.*, 649.
28. Rescission decreed by jury on ground that defendant was induced to exchange for complainant's land, which was situated in Florida, by the false and fraudulent representations of the latter, verdict not interfered with. *Bryan vs. Suggs*, 679.
29. Bill alleged sale of lands and taking of notes for purchase money; that complainant was induced by fraud to enter credit on notes for which he received no consideration; that defendants had combined to defeat payment of balance due; prayer that credit be corrected and land sold to pay balance: Error to require complainant to elect whether he would proceed for purchase money or for recovery of land. *Davis, ex'r, vs. Clark et al.*, 681.

ESTATES.

1. Forfeiture by breach of condition subsequent, estate not revested in grant-or until after entry or action brought by him or his heirs. *Edmonson vs. Leach, trustee*, 461.

See *Deeds*, 1-5.

ESTOPPEL. See *State*, 3.

EVIDENCE.

1. Written contract cannot be changed by parol. *Sims vs. Crawford, executor*, 31.
2. For sale to illustrate value, medium of payment, as well as price, should be regarded. Value of uncurrent funds at time and place of transaction material. *Atkins & Co. vs. Cobbs*, 86.
3. Partial failure of consideration on account of defective quality of goods pleaded, not competent to prove, in general terms, that purchasers sold large quantity of goods for uncurrent funds, and that funds became total loss. *Ibid.*
4. Exclusion of reasonable doubt as held requisite in some civil cases, means no more than that jury must be clearly satisfied. *Schnell, trustee, et al., vs. Toomer, adm'r, et al.*, 168.
5. Where it does not appear that party holds back evidence within his power, non-production of more full evidence raises no presumption against him. *Ibid.*
6. Plea, none to which testimony can apply, evidence inadmissible. *Shealy vs. Toole*, 210.
7. Affidavit in reference to loss or destruction of instrument, admissible as preliminary to introduction of secondary evidence. *South Geo. & Fla. R. R. Co. vs. Ayres*, 230.
8. Subscription to stock, suit by corporation to collect, evidence of value of that or of any other stock is irrelevant. *Ibid.*
9. Dying declarations, whether statements were, left to jury. *Jackson vs. State*, 235.

10. Unrecorded deed, one subscribing witness dead, other not recollecting contents, and deed lost, parol evidence admissible. *Graham vs. Campbell et al.*, 258.
11. Power authorizing disposition of several tracts recorded with deed to one and lost, record admissible upon trial of issue as to title to other tract, to show power once in existence. *Ibid.*
12. Secondary evidence, proof preliminary to introduction of for court, yet all the evidence admitted is for consideration of jury. *Ibid.*
13. Presumption, none, that railroad has authorized local agent to hinder access by counsel of plaintiff to adverse witness in its employ. *Marsh vs. South Carolina R. R. Co.*, 274.
14. Report of spectator immediately after homicide, as to cause thereof, not admissible as part of *res gestæ*. *Ibid.*
15. Judgment attacked by bill on ground of what took place at term when rendered, transaction at subsequent term irrelevant. *Ansley & Co. vs. Glendenning, adm'r*, 286.
16. Verdict is compounded of evidence, law and logic. Jury not obliged to stop precisely where evidence becomes silent, but from facts proven, or from absence of counter-evidence, may infer existence of other facts. *Mahone vs. Bryant*, 294.
17. Tax returns, evidence to charge guardian and sureties in suit on bond. *Dupont vs. Mayo et al.*, 304.
18. Affidavit for distress warrant alleges \$1,232 50 due, no such variance as requires non-suit for evidence to show contract to deliver cotton worth that amount. *Renew vs. Redding, assignee*, 311.
19. Sheriff's deed inadmissible without *fi. fa.* *Clarke & Wilson vs. Tra- wick*, 359. See *Irby vs. Gardner*, 643.
20. Color of title, sheriff's deed inadmissible as unless, on case made, it is relevant as such. *Ibid.*
21. Parol evidence of contents and character of deeds inadmissible without accounting for absence of instruments themselves. *Primrose vs. Browning*, 369.
22. Parol, true consideration of deed shown by. *Ibid.*
23. Memorandum on account and application for mechanic's lien, not recorded, and no evidence as to who put it there, inadmissible to show when work was completed. *Lawson, adm'r, vs. Coates*, 379.
24. Extortion, on charge for, competent to show that officer said warrant was for assault and battery as part of *res gestæ*, without producing warrant. *White vs. State*, 385.
25. Extortion, to throw light on guilty intention, officer's experience and acquaintance with his duties may be shown by proof that he had frequently been sent to make arrests, although it was alleged that he was a special constable. *Ibid.*
26. Traverse of garnishee's answer by claimant forms issue between plaintiff and claimant, garnishee is no party to issue, and his declarations are therefore inadmissible. *Phillips vs. Thurber & Co.*, 393.
27. Insane at time of commission of offense, whether defendant was question in issue, incompetent to ask physician whether certain domestic troubles constituted sufficient cause to produce insanity. *Carter vs. State*, 463.
28. Hearsay evidence is inadmissible. *Ibid.*
29. Bill of particulars charges defendant with gross amounts, nevertheless competent to prove various items composing same. *Alexanders vs. State*, 478.

30. Evidence itself irrelevant may be nevertheless so interwoven with relevant testimony as to require its admission in elucidation of latter. *Ibid.*
31. Correspondence, portion of introduced by defendant to establish fact; balance admissible at instance of plaintiff to rebut. *Moore vs. Hawks*, 557.
32. Issue being who purchased assets of firm and agreed to pay debts, a writing signed by defendants showing that they claimed some of the assets, etc., is relevant. *Law & Co. vs. McBride*, 568.
33. "Idea" of parties in making contract inadmissible. *Bryson vs. Chisholm*, 596.
34. Claim affidavit and bond, purporting to be executed in foreign state before notary, not received by levying officer without authentication. *Charles vs. Foster*, 612.
35. Seal of notary is not authentication; nor is certificate and seal of clerk of court of record, without further certificate from judge, etc. *Ibid.*
36. Trustee, note by, declared on as such, admissible without further proof. *Gaudy, trustee, vs. Babbitt et al., adm'rs*, 640.

EXECUTIONS.

1. Amended, execution may be to establish conformity in record. As between parties, amendment relates back to original date. *Saffold vs. Wade, ex'r*, 174.
2. Amend, after order to, new *fi. fa.* need not be issued. *Ibid.*
3. Diligence in searching for execution from superior court traced into sheriff's office, and not there to be found, requires search in clerk's office. *Clarke & Wilson vs. Trawick*, 359.
4. Credit on *fi. fa.* failure to enter, no ground to enjoin levy and sale. *Brown, adm'r, vs. Wilson et al.*, 534.

EXECUTIVE WARRANT. See *State*, 5-7.FACTORS. See *Lien*, 1, 8, 10, 11.FRANCHISE. See *Warranty*, 1, 2.

GARNISHMENT.

1. Count for *mesne* profits in ejectment is such an action for money as garnishment may issue thereon. *Walker vs. Zorn*, 35.
2. Plea alleging pendency of garnishment without stating in whose favor or for what amount, demurrable. *Shealy vs. Toole*, 210.
3. Pendency of garnishment not good plea in bar; but it affords ground for moulding judgment. *Ibid.*
4. Garnishee submits to answer out of county of residence, neither the defendant nor the claimant of the fund can object by plea of jurisdiction. *Phillips vs. Thurber & Company*, 393.
5. Traverse filed by claimant forms issue between plaintiff and claimant; garnishee is no party thereto, and his declarations are, therefore, inadmissible. *Ibid.*
6. Bond of claimant conditioned to pay to plaintiff the judgment which he may recover, is in substantial compliance with statute. Judgment may be entered thereon instantan. *Ibid.*

GOVERNOR. See *State*, 1, 2, 5, 6.GUARANTY. See *Principal and Security*, 1.

GUARDIAN AND WARD.

1. Private contract with guardian for purchase of ward's property for stipulated price, at future sale under leave from ordinary, contrary to public policy. *Downing et al. vs. Peabody, adm'r, 40.*
2. Money advanced to guardian upon such contract, cannot, as against ward, be treated as payment to succeeding guardian, on legal public sale made to persons who advanced money, even though such guardian so consented at time deed was made. *Ibid.*
3. It makes no difference that second guardian was surety on bond of first, and was also his business partner; that the money advanced came into the business so as to create a debt against the firm, which survived against second guardian, etc. *Ibid.*
4. Administrator of ward is entitled to maintain bill against second guardian and purchasers to compel actual payment of purchase money. *Ibid.*
5. Surety can only obtain discharge from guardian's bond by petition and process as required by section 4114 of Code. *Dupont vs. Mayo et al., 304.*
6. Order of discharge, based on no such proceeding, but simply accepting new bond, and declaring former surety discharged, void. *Ibid.*
7. Tax returns by guardian are evidence of assets to charge him and securities. *Ibid.*
8. Guardian chargeable with more assets than amount of bond, credits to which he is entitled applied to excess till exhausted. *Ibid.*
9. Loan funds to solvent persons, prior to Code guardian had authority to; and after act of April 18th, 1863, he could receive Confederate interest-bearing notes in payment thereof. *Tarpley et al. vs. McWhorter, guardian, 410.*
10. Agent to act for him during his absence in Confederate army, under act of December 11th, 1862, guardian had authority to appoint. *Ibid.*
11. Payment of notes belonging to ward, parties to knowing fact, and that title was in absent guardian, legal possession of notes alone not conclusive evidence of agency of holder of them to accept such payment. *Ibid.*
12. Witness, guardian competent on issue between him and heirs-at-law touching administration of deceased ward's estate, who was a lunatic, the heirs being in life and witnesses *Ibid.*

HOMESTEAD.

1. Waiver by mortgagor, for himself and family, of right to homestead, binding. *Simmons vs. Anderson, 53.*
2. Act of February 27th, 1874, applies to debts made prior to its passage. *Harris vs. Glenn et al., 94.*
3. Exemption is but a privilege dependent upon the will of the state. *Ibid.*
4. Exemption relied on as defense to mortgage, should it not be set up against foreclosure? *Ibid.*
5. After foreclosure, and after repeal of law allowing exemption, too late to assert exemption. *Ibid.*
6. Mortgage for purchase money on land, no part disencumbered so long as any portion of purchase money remains unpaid. *Ibid.*
7. Land sold, pending application, subject to homestead right; homestead subsequently set apart, subject to sale at instance of other creditor, under judgment on debt antedating constitution of 1868. *Clarke & Wilson vs. Trawick, 359.*

8. Application alleging that petitioner is head of family consisting of indigent daughter and her children, not dismissed on general demurrer. *Blackwell vs. Broughton et al.*, 390.
9. Issue is whether such daughter and children were, in good faith, members of applicant's family. *Ibid.*
10. Second or supplemental homestead, ordinary has no jurisdiction to set apart. *Woods, ord'y, vs. Jones*, 520.
11. First application not void because applicant did not allege that he was the head of a family, where it shows on its face that it was made for the use and benefit of his family, and when the same creditor objected on other grounds, but not on this. *Ibid.*
12. Ordinary's approval construed as applying to application and not to objections of creditor, although the objection be set out in the record between the application and the approval. *Ibid.*
13. Bankrupt system, collateral provisions in state exemption laws as to relation of husband and wife, or of parent and child, no part of. *Farmer vs. Taylor et al.*, 559.
14. Exempted property, bankrupt's title to not affected by adjudication or subsequent proceedings. *Ibid.*
15. Exchange of exempted personalty for property of like kind, whether legal or not, latter stands, as to creditors, in place of former. *Morris vs. Tennent*, 577.

HUSBAND AND WIFE.

1. Part of purchase money paid and bond for title given; judgment obtained for balance and *fi. fa.* levied on land, deed having been first filed in clerk's office. Wife of vendee cannot set up right to have money paid by husband refunded on ground that it was hers, by claim, without proving insolvency of vendor. *Boyd vs. Chappell*, 22.
2. Wife's property not liable for wages of overseer hired by husband, where there is no evidence that credit was not given to husband personally, etc. *Wagner, guardian, vs. Robinson*, 47.
3. Residence of family is legal venue of husband, and wife cannot, in absence of husband and without his assent, change such residence so as to change venue. *Sindall et al., vs. Thacker & Co. et al.*, 51.
4. Title and possession in husband until creditor, on faith of property, without notice of wife's equity, obtains judgment, lien superior to equity of wife resulting from fact that her money paid for land. *Zimmer vs. Dansby*, 79.
5. Widow may recover for homicide of husband, whether act of natural or artificial person, or result of intention or criminal negligence. *Cottingham vs. Weekes*, 201.
6. Will, wife may make without consent of husband, under constitution of 1868 and act of 1866. *Urquhart vs. Chapman*, 344.
7. Conveyance to husband in trust for wife and her children, born and to be born, creates executory trust which does not become executed whilst coverture subsists and children are minors. *Boyd et al. vs. England*, 598.
8. Wife, suing for herself and as next friend for children, cannot, pending coverture, recover the land at law from purchaser from husband as trustee, without bringing in trustee as a party, and without submitting to such terms, etc., as would entitle her to a decree in equity. *Ibid.*

INDICTMENT. See *Criminal Law*, 14-16.

INDORSEMENT.

1. "For collection," indorsement by payees, canceled by subsequent indorsement to other indorsees for value. *Atkins & Co. vs. Cobbs*, 86.
2. Defense as full as if bill had not been negotiated, immaterial with what motive payees transferred, or plaintiffs acquired, title. *Ibid.*
3. Note payable on its face at private banking office, not necessary to protest to charge indorser. *Banks & Bro. vs. Besser*, 199.
4. Note containing no negotiable words, indorsee before due takes with notice of defects in consideration. *Cohen vs. Prater*, 203.
5. Accommodation indorser becomes debtor from time he indorses, and not from time note matures. *Primrose vs. Browning*, 369.
6. Indorsement declared upon as in full, in absence of plea authorizing, parol evidence inadmissible to vary legal effect. *Meador vs. Dollar Savings Bank et al.*, 605.
7. Indorsement in blank, subsequently filled by insertion of usual terms, presumptive undertaking may be varied by parol. *Ibid.*
8. Note paid off by maker, no ground to enjoin action against indorser. *Williams vs. Stewart et al.*, 663.

INJUNCTION.

1. Sale of mules, injunction against, violated; order directing return of mules, or payment into court of purchase money, or attachment for contempt, not interfered with. *Thweatt et al. vs. Gammell et al.*, 98.
2. Waste of land and use of profits by vendee enjoined at instance of vendor, and receiver appointed, where former holds under bond for titles, having paid no part of purchase money, and from peculiar facts there is danger of latter's losing debt. *Tufts vs. Little, administrator*, 139; *Gunby vs. Thompson*, 316; *Chappell vs. Boyd et al.*, 578.
3. Creditor without lien, or title, or judgment, has not, as general rule, right to invoke injunction and receiver to prevent assignment of debtor's goods, or to deprive debtor or assignee of possession. *Johnson & Smith et al. vs. Farnum et al.*, 144; *Mayer & Co. et al. vs. Wood, March & Co. et al.*, 427; *Crawford, ex'r, vs. Spurling*, 611.
4. Review, bill of filed, and there appears good cause for reversing decree, enforcement thereof enjoined until hearing. *Bennett vs. Brown*, 216.
5. Discretion of chancellor in granting injunctions and appointing receivers, not controlled. *Esterlund et al. vs. Dye*, 284; *Gunby vs. Thompson*, 316; *Ellis & Palmer vs. Jones & Co.*, 504; *Douglass et al. vs. Fitzgerald*; *Girardey et al. vs. Moore et al.*; *Gregory vs. Rawson*, 526.
6. Receiver cannot be directed by chancellor, before final hearing, to sell portion of property and to pay to complainant amount claimed to have been advanced by him. *Ibid.*
7. Equity based on fact that judgment to be enjoined is conclusive in another suit against complainant, amendment that judgment is void for want of jurisdiction in court which rendered it, demurrable. *Ansley & Co. vs. Glendenning, adm'r*, 286.
8. Object to attack judgment for what took place at term when rendered, evidence of transaction at subsequent term irrelevant. *Ibid.*
9. Property holders who have paid, whether voluntarily or by coercion, illegal municipal taxes in former years, have no right to set-off, by injunction or otherwise, such payments against taxes of later years. *Wayne, adm'r, et al. vs. Mayor and Ald. of Savannah*, 448.
10. Discretion of chancellor in use of remedy of injunction to restrain collection of taxes upon questions involving whole system of municipal finance, not interfered with. *Ibid.*

11. Land-owners not enjoined from unlawfully firing woods at undue seasons of the year to the injury of the range for cattle, where injunction is applied for by proprietor of cattle who rests his bill upon right of common of pasture, but shows no right other than what might be enjoyed by the public in general. *Harrell vs. Hannum & Coleman*, 508.
12. Legal remedies must be exhausted before equity will interfere. *Ibid.*
13. Granting injunction without notice to party to be enjoined, error. *Jackson vs. Byne*, 525.
14. Trespass, refusal to restrain where defendants are able to respond in damages, discretion not controlled. *Sum. Mac., Graded or P. R. Co. vs. Aug. Land Co.*, 527.
15. Cause shown against granting injunction not required where there is no equity in bill. *Brown, adm'r, vs. Wilson et al.*, 534.
16. *Res adjudicata*, matters which are cannot be urged as ground for injunction. *Ibid.*
17. Contingent liability to which estate is exposed, known to administrator and not set up at law, not serve as basis for injunction. *Ibid.*
18. Credit on *fi. fa.*, failure to enter, not warrant injunction against levy and sale. *Ibid.*
19. Execution levied on personalty which is subsequently seized under another *fi. fa.*, sale under latter not enjoined. Parties left to remedies at law. *Endres et al. vs. Loyd et al.*, 547.
20. That magistrate will not administer law correctly, no ground for injunction. *Ibid.*
21. Successive claims interposed, pretended title being conveyed from one to the other, for purpose of delay, claimants being insolvent, and the first having been decided in favor of plaintiff, injunction will issue and receiver be appointed. *Chappell vs. Boyd et al.*, 578. See *Crawford, ex'r, vs. Spurlin*, 611.
22. As first claim was not decided, and application for receiver not made until growing crop was planted, receiver instructed to allow defendant a reasonable time to gather crop, etc. *Ibid.*
23. Claim interposed under pauper affidavit for delay, and that by depreciation of property there is danger of losing debt, alleged as ground for injunction and receiver, defendant in *fi. fa.* is necessary party. *Crawford, ex'r, vs. Spurlin*, 611.
24. Jurisdiction to decree injunction by verdict of jury, this court not committed to position that common law court has. *Toole vs. Perry*, 627.
25. Attachment not enjoined at instance of person not a party thereto, unless proceeding to his injury, and under circumstances that would authorize equity to interfere. *Williams vs. Stewart et al.*, 663.
26. That note has been paid by maker no ground to enjoin suit against indorser. *Ibid.*
27. Vendor who has given bond and transferred notes for purchase money, first having indorsed them, has no right because of suit on indorsement, to enjoin sale of land, etc. *Ibid.*
28. Mortgage *fi. fa.* being for purchase money and defendant having failed to comply with agreement as to payment, and having colluded with his wife, by which she filed claim for purpose of delay, and collection of debt rendered doubtful by waste of land, demurrer to bill containing such allegations and praying for injunction and receiver, properly overruled. *Worrill et al. vs. Coker*, 666.
29. Discretion of chancellor in retaining receiver until final disposition of case, not controlled. *Ibid.*

INSURANCE.

1. Agent of life company has no authority to contract that premium shall be paid in medical services. *Carter vs. Cotton States Life Insurance Co.*, 237.
2. Application for insurance accepted; policy issued and placed in hands of agent of company for delivery to applicant upon payment of premium, and premium was tendered, but agent refused to receive premium or to deliver policy on account of change in health of applicant: *Held*, that the delivery of the policy to the agent of company was a delivery to the applicant, and the contract was then consummated. Especially is this true where the premium was tendered to the agent at the time the application was made. *Southern Life Ins. Co. vs. Kempton, adm'r*, 339.

INTEREST AND USURY.

1. Title made as part of usurious contract, void. *Johnson & Smith vs. Wheelock*, 33.
2. Contract usurious on face, usury need not be pleaded. *Shealy vs. Toole*, 210.
3. Verdict for usury contrary to law. *Ibid*.
4. Definite sum due, interest allowed thereon. *Thomson vs. Ocmulgee B. & L. Ass.*, 350.

INTERPLEADER—BILL OF. See *Equity*, 24.JOINT LIABILITY. See *Contracts*, 8, 17-18.

JUDGMENTS.

1. United States court, final judgment of conclusive as to all matters of practice so far as state courts are called upon to pass upon such judgment. *Sindall et al. vs. Thacker & Co. et al.*, 51.
2. Title and possession in husband until creditor, on faith of property, without notice of wife's equity, obtains judgment, lien superior to equity of wife resulting from fact that her money paid for land. *Zimmer vs. Dansby*, 79.
3. Foreclosure, judgment of is final adjudication that debt is due and that property is subject thereto. *Harris vs. Glenn et al.*, 94.
4. Declaration on note by trustee, which sets forth no trust estate, judgment by default against trust property set aside on motion. *Winslow, trustee, vs. O'Pry, for use*, 138.
5. Where verdict is against both defendants, but finds one of them to be security only, judgment against "defendant" construed as including both. *Saffold vs. Wade, ex'r*, 174.
6. Levy within time, made upon property of one defendant, entry keeps judgment from becoming dormant as to either. *Ibid*.
7. After levy was disposed of by paying out proceeds to older *fi. fas.*, competent to amend judgment by inserting letter "s," and the name of one of the defendants as principal, and the other as security. Execution might also be amended to conform to judgment. *Ibid*.
8. That illegality by security on grounds which these amendments cured, had previously been sustained, no obstacle thereto. *Ibid*.
9. As between parties, amendments to judgment and *fi. fa.* to establish conformity in whole record, relate back to original dates. *Ibid*.
10. After order to amend judgment and *fi. fa.*, not requisite to enter new judgment or to issue new *fi. fa.* *Ibid*.

11. Demurrer, judgment on, complete bar to second suit and to any legitimate amendment thereto. *Kimbro & Morgan vs. Va. & Tenn. A. L. R. R. Co.*, 185.
12. Demurrer, judgment on dismissing case, not within section 2932 of Code authorizing renewal. *Ibid.*
13. Equitable defense, not barred by judgment at law, when. *Radcliff & Lamb vs. Varner & Ellington*, 222.
14. *Nunc pro tunc* judgment, to entitle party to have entered, term of court at which rendered must be shown. *Robertson vs. Pharr*, 245.
15. *Nunc pro tunc* judgment not entered on parol evidence alone where there is no entry anywhere showing disposition of case. *Ibid.*
16. Administrator not entitled to relief against because he did not know assets were deficient, or because ignorant of effect of judgment as evidence of assets. *Page, adm'r, vs. Haines, adm'r*, 263.
17. Property belonging to debtor in 1855 directed to be sold, and trust debt to be paid from proceeds, judgment not construed to embrace rents, etc., of lands, nor stock, etc., none of which belonged to debtor in that year. *Vason, trustee, vs. Ball, adm'r, et al.*, 268.
18. Debt proved in bankrupt court by judgment creditor, lien otherwise had, waived. *Heard vs. Jones*, 271.
19. Justice of peace, judgment by for amount exceeding \$50 00 on nineteenth day from date of summons, void. *Reid vs. Jordan*, 282.
20. Administrator, judgment against reviving judgment *vs.* intestate, evidence of assets. *Ansley & Co. vs. Glendenning, adm'r*, 286.
21. Order of discharge not recite that surety on guardian's bond has petitioned, etc., as required by section 4114 of Code, and these facts do not otherwise appear, but order, on face, indicates some informal proceeding by consent, no presumption that more was done than record shows. *Dupont vs. Mayo et al.*, 304.
22. Order granting leave to administrator to sell land obtained on published notice required by section 2559 of Code, valid so far as authority to sell is concerned. *Davis, adm'r, vs. Howard*, 430.
23. Upon ejectment by administrator against heir, such order is not conclusive of their being debts outstanding. *Aliter*, if obtained on personal notice. *Ibid.*
24. Distribution, sale of land by executor for, discharges it from judgment liens against legatee whose interest was one equal undivided share. *McDaniel vs. Edwards*, 444.
25. Partner colluded with third person to defraud plaintiff, and latter recovered judgment against such third person; no bar to suit *vs.* firm. *Alexanders vs. State*, 478.
26. Suit commenced in 1856 and judgment in 1874; latter not set aside for clerical mistake in process, the defendant having pleaded to merits at first term, and his executor having also pleaded to merits. *Blalock vs. Tidwell*, 517.
27. Reversal simply vacates judgment excepted to and is to be followed by new trial. *Woods, ord'y, vs. Jones*, 520.
28. Reversal of judgment against sheriff on money rule, on ground that creditor's lien is inferior to competing order setting fund apart to debtor's family as exempt, creditor may, upon new trial, attack order for want of jurisdiction in ordinary to grant it, that question not having been made on first trial. *Ibid.*
29. Matters disposed of on plea or answer at law cannot be urged as cause for enjoining judgment. *Brown, adm'r, vs. Wilson et al.*, 534.

30. Contingent liability to which estate was exposed, known to administrator but not set up before judgment, no ground to enjoin. *Ibid.*
31. Dormant, judgment is not where, within seven years, a motion was made by defendant for relief against it, and *fi. fa.* was ordered to proceed, though no entry appear thereon. *Nelson vs. Gill*, 537.
32. *Res adjudicata*, judgment relied upon to sustain defense does not cover matter in controversy. *Hawkins vs. Smith, trustee*, 571.
33. *Bona fide* purchaser of land, in possession for four years, without notice of judgment or levy thereon, holds land discharged from lien of judgment, though it had been levied on before purchase, no further steps having been taken to enforce levy. *Braswell vs. Plummer*, 594.
34. Purchaser with actual notice of judgment, not protected therefrom by four years' possession under section 3583 of Code. He cannot be, in sense of that section, a *bona fide* purchaser. *Phillips vs. Dobbins*, 617.
35. Binding on party who had no notice, judgment is not. *Payne, treas., vs. Perkerson, sh'ff*, 672.

JURISDICTION.

1. Garnishee submits to answer out of county of residence, neither the defendant, nor the claimant of the fund, can object by plea to jurisdiction. *Phillips vs. Thurber & Co.*, 393.
2. Damage laid within, jurisdiction maintained, though proof shows damage exceeding jurisdiction, when verdict is for sum within. *Tyler Cot. P. Co. vs. Chevalier*, 494.
3. Action for turning off employee containing two counts, first for damages laying the amount within the jurisdiction, and second on the contract which is shown by proof to be for sum beyond jurisdiction, jurisdiction maintained on first count. *Ibid.*
4. Injunction, this court not committed to position that common law court has jurisdiction to decree by verdict of jury. *Toole vs. Perry*, 627.
5. Road commissioners' court has no jurisdiction to punish person to whom portion of public road is assigned under section 621 *et seq.* of Code, for neglect of duty. *Patillo vs. Cutliff et al.*, 689.

JURY.

1. Error to charge that they are in no sense judges of the law. *Habersham vs. State*, 61.
2. Verdict is compounded of evidence, law and logic. Jury not obliged to stop precisely where testimony becomes silent, but from facts proven, or from absence of counter-evidence, may infer existence of other facts. *Malone vs. Bryant*, 294.
3. List substantially complying with law, though no certificate attached to effect that it contained all the names in jury box, sufficient. *Carter vs. State*, 463.
4. Competency of jurors, in trying only statutory questions can be asked in first instance; after juror is pronounced competent, then evidence may be introduced showing incompetency. After introduction of such evidence, court may examine juror further. *Ibid.*
5. Separation of jury, known to defendant, but not brought to attention of court, no ground of new trial. *Ibid.*
6. That juror said that "he wanted defendant's case to come before him, that he would remember or recollect him," not ground to set aside verdict where he swears to his impartiality. *Ash vs. State*, 583.

7. That court instructed grand jury of twenty-four to excuse last man, to then organize and return into court to be sworn, etc., not invalidate bill subsequently found. *Ridling vs. State*, 601.
8. Separation of juror from jury ground for new trial, unless no communication with any one on subject of trial be shown. *Daniel, alias Neal, vs. State*, 653.

JUSTICE COURTS. See *Judgments*, 19.

LANDLORD AND TENANT.

1. If in affidavit for distress warrant, definite sum is claimed as due, time it became due and terms of rent contract need not appear. *Driver vs. Maxwell, adm'r*, 11.
2. Burden of repairs is generally on landlord, but patent defects existing at time of renting need not be mended by him, nor by tenant. *Ibid.*
3. Where rent reserved is portion of crop raised, and both parties know fence not to be sufficient to keep out stock, loss therefrom must fall on both. *Ibid.*
4. Bankruptcy of defendant, distress warrant levied before, paid out of proceeds of property. *Loudon, assignee, vs. Blandford & Garrard et al.*, 150.
5. Replevy and await judicial termination of controversy, tenant not bound to, to entitle him to action for maliciously suing out distress warrant. *Sturgis & Berry vs. Frost*, 188.
6. Distress warrant is final process; after levy it is in nature of suit terminated. *Ibid.*
7. Replevy, can tenant, where warrant issues before rent is due. *Ibid.*
8. Distress warrant, affidavit alleged indebtedness of \$1,232 50, and evidence showed contract to deliver cotton worth that amount, not such variance as requires non-suit. *Renew vs. Redding, assignee*, 311.
9. Distress warrant lies for rent payable in cotton. *Ibid.*
10. Tort committed by cropper in hiring servants previously employed by another, landlord not responsible for. *Duncan vs. Anderson*, 398.
11. Assignee for value of right to let farm and to collect rent, may distrain for same. *Katon vs. Tifts*, 446.

LEVY AND SALE.

1. Land held under bond sold under judgment in favor of transferee of notes, deed having been filed by vendor; nor does fact that bond has been assigned and deed made by vendee to assignee, affect case. *Scroggins vs. Hoadley*, 165.
2. Though bond obligated vendor to make deed so soon as certain payments were made and notes given, which conditions had been complied with, still land may be sold under judgment. *Ibid.*
3. Land sold, pending application, subject to homestead right; homestead subsequently set apart, subject to sale at instance of other creditor, under judgment on debt antedating constitution of 1868. *Clarke & Wilson vs. Trawick*, 359.
4. Property offered for sale withdrawn on promise that defendant would pay *fi. fa.*; money paid to sheriff in accordance with promise, not subject to older execution. *Carhart & Bro. vs. Grier*, 383.
5. Liability of sheriff for failure to levy is injury thereby sustained by plaintiff. He may therefore show that property did not belong to defendant. *Cowart vs. Dunbar & Co. et al.*, 417.

6. Estate forfeited by breach of condition subsequent, not subject to levy as property of grantor under judgment junior to conveyance until entry or action by grantor or his heirs. *Edmondson vs. Leach, trustee, 461.*
7. Credit on *f. fa.*, failure to enter, no ground to enjoin levy and sale. *Brown, adm'r, vs. Wilson et al., 434.*
8. Execution levied on personalty which is subsequently seized under other *f. fa.*, equity not enjoin sale under latter. Remedy at law complete. *Endres et al. vs. Loyd et al., 547.*
9. Assignee of two judgments upon older of which there is security, must apply proceeds of sheriff's sale to older, otherwise security will be discharged *pro tanto*. *Simmons vs. Cates et al., 609.*
10. That assignee was purchaser of property sold and paid no money, but considered it paid, makes no difference. *Ibid.*
11. Claim affidavit and bond, purporting to be executed in foreign state before notary, not received by levying officer without authentication. *Charles vs. Foster, 612.*
12. Seal of notary is not authentication; nor is certificate and seal of clerk of court of record without further certificate from judge, etc. *Ibid.*
13. Sheriff receiving such papers, with non-resident security on bond, *prima facie* liable to rule. *Ibid.*
14. In answer to rule for failure to sell sheriff cannot go behind judgment to excuse his delinquency. *Ibid.*
15. Neglect to levy, to authorize rule against sheriff for, it must appear that sheriff was in contempt, and that plaintiff was injured. *Hunter, sheriff, vs. Phillips, 634.*
16. Failure to levy when directed by plaintiff, by which latter is injured, makes him liable to rule. *Ibid.*
17. Injunction granted to arrest sale after levy was made, presumption that plaintiff was injured, rebutted. Rule should be kept open until final decree on bill for injunction. *Ibid.*

LIBEL.

1. Amendable by adding count for trespass on person, action for libel is not; especially if action for trespass be barred. *Ransone vs. Christian, 351.*
2. Justification pleaded, defendant assumes burden of proof and is entitled to opening and conclusion of argument; nor is right forfeited by withdrawal of plea at commencement of trial and failure to renew same until plaintiff has made out *prima facie* case. *Ibid.*
3. Justification of libel charging perjury must be made out by at least one witness and corroborating circumstances, but such circumstances need not be sufficient to amount to another witness. *Ibid.*
4. Special damage not alleged, and no proof thereof, court should charge, on request, that no special damage can be allowed. *Ibid.*
5. Malice need not be proven where libel charges crime, whether it be printed or written. *Ibid.*
6. Though libel be punishable on criminal side of court, yet, in absence of evidence of prosecution therefor, damages should not be mitigated. *Ibid.*
7. Personal injuries sustained from an assault by plaintiff may be set-off against damages. *Ibid.*

LIEN.

1. Cotton delivered by debtor to agent of factors and placed on their drays to be carried to warehouse, lien attached at once. *Burrus & Williams vs. Kyle & Co.*, 24.
2. Action not being brought by plaintiffs as mechanics, but as partners and contractors, not entitled to recover lien as mechanics. *Sav., Grif. & N. A. R. R. Co. vs. Grant, Alexander & Co.*, 68.
3. If plaintiffs were mechanics, and contracted to do work as such, entitled to lien. *Aliter*, if they were to work in capacity of contractors. *Ibid.*
4. Court cannot decide whether work done under written contract was in capacity of mechanics. *Ibid.*
5. Personalty sold and delivered, no lien in favor of vendor implied by law. *Johnson & Smith et al. vs. Farnum et al.*, 144.
6. Affidavit to foreclose lien in behalf of owner of saw-mill, must show demand when, or after, debt became due. *Gilbert & Scott vs. Marshall*, 148.
7. Mechanic's lien properly recorded and sued within twelve months by attachment, but not re-sued after dissolution of attachment because of bankruptcy of defendant, in distribution of fund raised, ranks from date of lien. *Loudon, assignee, vs. Blandford & Garrard et al.*, 150.
8. Crop-lien foreclosed and levied, but defeated by appointment of receiver who takes crop and uses it in planting, paid out of fund in receiver's hands. *Ball, adm'r, et al., vs. Vason, trustee, et al.*, 264.
9. Attorney contracts that fee shall be paid out of proceeds of suit, he has inchoate lien upon commencement of action, which cannot be defeated by dismissal by client over objection of attorney. *Twiggs et al., vs. Chambers*, 279.
10. Affidavit to foreclose crop-lien must state all facts necessary to constitute valid lien. *Powell & Murphy vs. Weavers*, 288.
11. Trustee has no authority to create lien for supplies with which to make crop. *Taylor & Co. vs. Clark et al.*, 309.
12. Land conveyed in 1870, vendor has no lien for purchase money; nor, after death of vendee, is he entitled to priority of payment out of assets. *Jones vs. Jones, adm'r*, 325.
13. Memorandum on account and application for mechanic's lien, not recorded, and no evidence as to who put it there, inadmissible to show when work was completed. *Lawson, adm'r, vs. Coates*, 379.

See *Judgments*.

LIMITATIONS—STATUTE OF.

1. Bill not amendable into action which would have been barred if brought at time of proposed amendment. *Ayres vs. Daly*, 119.
2. Consent decree, after full execution and many years of acquiescence, not disturbed. *Freeman et al. vs. Craver, adm'r, et al.*, 161.
3. Ignorance of fraud which, by use of ordinary diligence, might have been discovered, not prevent statute from running. There was a clue. *Ibid.*
4. Trustee barred, so are beneficiaries. *Schnell, trustee, et al. vs. Toomer, adm'r, et al.*, 168.
5. Levy within time, made upon property of one defendant, keeps judgment from becoming dormant as to either. *Saffold vs. Wade, ex'r*, 174.
6. Execution against stockholder under section 3371 *et seq.* of Code, in June, 1869, prevents bar of act of 1869, though no levy was made until June, 1870. *Stone et al., ex'rs, vs. Davidson, assignee*, 179.

7. Amendment making new case, statute runs to time when made. *Kimbro & Morgan vs. Va. & Tenn. A. L. R. Co.*, 185.
8. Demurrer, judgment on dismissing case, not within section 2733 of Code authorizing renewal. *Ibid.*
9. Libel, suit for not amendable by adding count for trespass to person, especially if action for trespass, be barred. *Ransome vs. Christian*, 351.
10. Renewals of contracts dated prior to June 1st, 1865, not within provisions of limitation act of 1869. *Garwin, ex'r, vs. Wheelchel*, 526.
11. Dormant, judgment is not where, within seven years, a motion was made by defendant for relief against it, and *fi. fa.* was ordered to proceed, though no entry appear thereon. *Nelson vs. Gill*, 537.
12. *Bona fide* purchaser of land, in possession for four years, without notice of judgment or levy, holds the land discharged from lien of judgment, though it had been levied on before his purchase, no further steps having been taken to enforce levy. *Brasswell vs. Plummer*, 594.
13. Purchaser with actual notice of judgment not protected by four years' possession under section 3583 of Code. He cannot be, in sense of that section, a *bona fide* purchaser. *Phillips vs. Dobbins*, 617.
14. Note made and due in 1866 is within 8th section of limitation act of 1869, and is governed by the Code. *Callaway vs. West et al.*, 684.
15. That for a period beginning after the statute commenced running, and terminating before the bar attached, the note was in the hands of the principal maker as an attorney, under his professional engagement to sue it to judgment against himself and his sureties, which engagement he violated, no reply to plea of the statute by such principal. *Ibid.*

LOST PAPERS—ESTABLISHMENT OF. See *Practice in Superior, City, and County Courts*, 17-19.

MALICIOUS SUIT. See *Actions*, 2.

MANDAMUS.

1. Stockholders, to compel payment by of subscription to settle debts against company, remedy in equity better than *mandamus* against directors, when. *Dal. & Morg. R. R. Co. vs. McDaniel et al.*, 191.
2. City court refusing or neglecting to supervise and approve such a record of exceptions as will fairly present case for review, compelled by *mandamus*. *Tyler Cot. P. Co. vs. Chevalier*, 494.
3. Chambers, *mandamus* absolute cannot issue at. *Payne, treasurer, vs. Perkerson, sh'ff*, 672.
4. Absolute *mandamus* cannot issue against county treasurer directing him to pay claim of sheriff, which is neither stated in affidavit of latter to be due him by county, nor to have been demanded by him from the treasurer or any other officer of the county. *Ibid.*
5. In face of resolution approved by governor, directing treasurer not to pay executive warrant, *mandamus* not issue. *Fletcher, ex'r, vs. Renfro, treasurer*, 674.

MASTER IN CHANCERY. See *Equity*, 3, 21.

MECHANIC'S LIEN. See *Lien*, 2-4, 7.

MORTGAGE.

1. Judgment of foreclosure is final adjudication that debt is due and that property is subject to pay it. Should not defense of exemption have been presented in answer to rule nisi? *Harris vs. Glenn et al.*, 94.
2. After foreclosure, too late to say that debt was not due according to real contract of the parties, or that payments had been made which had not been credited. *Ibid.*
3. Title not passed by mortgage; hence rents, etc., of property are mortgagor's; nor is stock, or increase thereof, nor plantation tools, subsequently bought, included within mortgage unless expressly so stipulated. *Vason, trustee, vs. Ball, adm'r, et al.*, 268.

NEGLIGENCE. See *Charge of Court*, 15.

NEGOTIABLE SECURITIES.

1. Indorsee of note with no negotiable words, takes with notice of defects in consideration, though indorsed to him before due. *Cohen vs. Prater*, 203.
2. *Bona fide* purchaser of railroad stock protected. *Stinson vs. Thornton, adm'r*, 377.
3. Bank certificate of deposit indicating no time of payment other than can be inferred from words "interest at rate of seven per cent. on call, and ten per cent. per annum," is due immediately, and *bona fide* holder is affected with equities existing between parties prior to themselves. *Meador vs. Dol. Sav. Bank et al.*, 605.

NEW TRIAL.

1. Immaterial error no ground of. *Wagner, guardian, vs. Robinson*, 47; *Sindall et al. vs. Thacker & Co. et al.*, 51; *Felton vs. State*, 84; *Renew vs. Redding, assignee*, 311; *DeSaulles & Co. vs. Leake*, 365; *Ward vs. State*, 408; *Crump, adm'r, vs. Williams*, 590; *Boyd et al., vs. England*, 598; *Toole vs. Perry*, 627.
2. Discretion granting new trial not controlled. *Methvin vs. Shorter et al.*, 83; *Winter et al. vs. Eagle & P. Man. Co.*, 249; *Duncan vs. Anderson*, 398; *Hardin & Blakeman vs. Hanna*, 453; *McIntyre vs. Tyson*, 468; *Boyd & Son vs. Hall et al.*, 563.
3. Discretion refusing not controlled where there is sufficient evidence to sustain verdict. *Felton vs. State*, 84; *Lee, ex'r, vs. Chisholm et al.*, 126; *Ga. R. R. & B'k'g Co. vs. Goldwire*, 196; *Jackson vs. State*, 235; *Graham vs. Campbell et al.*, 258; *Attaway vs. State*, 363; *Woolfolk vs. M. & A. R. R. Co.*, 457; *Carter vs. State*, 463; *Virgin et al. vs. Wingfield, adm'r*, 474; *Underwood vs. State*; *Faver vs. State*; *Fields, Witherspoon & Co. vs. Demore & Co.*, 525; *Law & Co. vs. McBride*, 568.
4. Newly discovered evidence tending to impeach witness no ground of. *Felton vs. State*, 84.
5. Verdict for usury set aside as contrary to law. *Shealy vs. Toole*, 210.
6. Newly discovered evidence, stipulation in copy note attached to declaration cannot be. *Ibid.*
7. Newly discovered evidence which would probably change result, ground of. Sufficient diligence shown in this case. *Winter et al. vs. Eagle & P. Man. Co.*, 249; *Mathews vs. State*, 469.
8. Newly discovered evidence, though cumulative, considered in connection with ground that verdict is contrary to evidence. *Napier vs. Trimmer, adm'r*, 300.

9. Verdict contrary to the evidence. *Bailey et al. vs. State*, 314; *Sav. & Char. R. R. Co. vs. Callahan et al.*, 331; *Lawson, adm'r, vs. Coates*, 379; *At. & Rich. A. L. R. Co. vs. Campbell*, 586.
10. Newly discovered evidence that witness will swear that she heard another admit committing the crime with which defendant was charged, not authorize new trial. *Attaway vs. State*, 363.
11. Newly discovered evidence which would not have changed result, and which might have been procured by diligence, and which counsel do not swear they did not know at trial, no ground of. *Dunn vs. State*, 401; *Gilmore vs. Murphy*, 510; *Mallory vs. State*, 545; *Ash vs. State*, 583.
12. Newly discovered evidence, known to defendant at trial is not, though unknown to counsel. *Young vs. State*, 403.
13. Newly discovered evidence not strictly cumulative, may be of no higher value than cumulative testimony. *Ibid.*
14. Such ground of new trial is not favored. Advantageous practice to let it appear in record who the witness is, etc. *Ibid.*
15. Judge, question of fact submitted to for trial, decision is as binding as verdict, and will only be vacated under rules governing the setting aside of verdicts. *Carter vs. State*, 463.
16. Motion made at term when verdict was rendered except in extraordinary cases, but rule *nisi* need not then be granted; if about to be granted at subsequent term and service of it be waived, sufficient to keep case in court. *McIntyre vs. Tyson*, 468.
17. Motion made at proper term but no rule *nisi* granted and no brief of evidence approved; case comes on before succeeding judge, and no motion made to dismiss preliminary to argument, and such motion is mainly insisted on after announcement of intention to grant new trial, discretion of court in refusing to dismiss not interfered with, especially where objecting party is allowed to amend brief of evidence to suit himself. *Power et al. vs. Sav., S. & S. R. R. Co.*, 471.
18. Oral request to charge in course of argument, refusal to give not authorize new trial. *Wilson vs. First Pres. Church*, 554.
19. *Corpus delicti* less fully established than might be expected, new trial more readily granted for error in charge. *Minor vs State*, 630.

NOLLE PROSEQUI. See *Criminal Law*, 51.

NON-SUIT. See *Practice in Superior, City and County Courts*, 22.

NOTICE. See *Principal and Agent*, 7.

OFFICE PAPERS. See *Practice in Superior, City and County Courts*, 17-19.

OFFICERS DE FACTO. See *Corporations*, 9.

PARENT AND CHILD. See *Contracts*, 3.

PARTITION. See *Trusts*, 14-16.

PARTNERSHIP.

1. Partner colluded with third person to defraud state; state recovered judgment against third person; no bar to suit against firm. *Alexanders vs. State*, 478.

2. Money fraudulently obtained by partner in name of firm, and in business transactions such as it usually engaged in, from state, firm liable therefor even though such conduct was unknown to other partner. *Ibid.*
3. If officer of state paying the money knew that the partner was acting in violation of duty to firm, latter not liable. *Ibid.*
4. Firm not liable for money fraudulently obtained by partner in matter having no connection with ordinary business of firm. *Ibid.*

PASTURE—COMMON OF. See *Injunction*, 12.

PAYMENT.

1. Money advanced to guardian on private sale of ward's property, not treated as payment, though succeeding guardian should so consent on sale legally made. *Downing et al. vs. Peabody, adm'r*, 40.
2. Creditor directs debtor to send money to F, or some other good house in Macon; debtor sends money to G, in Macon, and so writes creditor, but letter is not received until after money becomes worthless, no payment. *Holland et al., adm'rs, vs. Tyus et al.*, 36.
3. Promise to pay in currency by future day, sum equal to given amount of currency at date of promise, is to be discharged, after maturity, with no less currency than at maturity. Debtor only entitled to appreciation to expiration of credit. *Whitaker vs. Dye*, 380.
4. Possession of notes alone is not conclusive evidence of authority to accept payment, where parties knew that notes belonged to ward and that title was in absent guardian. *Tarpley et al. vs. McWhorter, guardian*, 410.

PENALTY. See *Contracts*, 13.

PLEADINGS.

1. Although action in short form alleged personalty to be in possession of defendant, whilst proof shows conversion before suit, non-suit not ordered. *Wilkin vs. Boykin*, 45.
2. Action not being brought by plaintiffs as mechanics, but as partners and contractors, not entitled to recover lien as mechanics. Amendment will cure omission. *Sav., Grif. and N. Ala. R. R. Co. vs. Grant, Alexander & Co.*, 68.
3. Imperfect plea which indicates meritorious defense stricken, this court will direct that it be reinstated on terms. *Wright vs. Shorter*, 72.
4. Copy of draft and indorsement thereon, annexed to declaration in short form, used to aid defective allegations. Indorsement need not be alleged if copied. *Atkins & Co. vs. Cobbs*, 86.
5. Motive that induced filing of plea immaterial. *Ibid.*
6. Declaration against trust estate must make such case as would render estate liable in equity. *Winslow, trustee, vs. O'Pry, for use*, 138.
7. Declaration, judgment and execution must specify property constituting estate. *Ibid.*
8. Garnishment pleaded without stating in whose favor or for what amount, plea demurrable. *Shealy vs. Toole*, 210.
9. Copy note attached to declaration, defendant must know what stipulations are embraced therein. *Ibid.*
10. Dispensed with by consent, pleadings cannot be. *Cent. Bank of Geo. et al. vs. Johnson & Smith et al.*, 225; *Payne, treas., vs. Perkerson sh'ff*, 672.

11. General demurrer based on defect curable by amendment, overruled. *Blackwell vs. Broughton et al.*, 390.
12. Disability of plaintiff should be pleaded at first term. *Alexanders vs. State*, 478.
13. Indefinite and uncertain plea stricken on demurrer. *Gilmore vs. Murphy*, 510.
14. Evidence makes case other than that presented by bill, no recovery had. *Rakestraw et al., ex'rs, vs. Brogdon*, 549.
15. Nominal party sues for use of real, former stricken by amendment. *Wilson vs. First Pres. Church*, 554.
16. Counter-affidavit to enforcement of mechanic's lien returned by sheriff, with other papers in case, to clerk's office, all become office papers of superior court. Copies established on motion. *Morris vs. Ogles*, 592.

POSSESSORY WARRANT.

Right to possession turned on evidence, and no error of law complained of, decision of magistrate not reversed. *Burkhalter vs. Baker*, 525.

PRACTICE IN THE SUPERIOR, CITY AND COUNTY COURTS.

1. Discretion refusing to allow leading questions on cross-examination, not controlled unless abused. *Bivins & Williams vs. Kyle & Co.*, 24.
2. Questions of amendments and irregularities in connection therewith, in the district court of the United States, are matters of practice in that court, and will not be inquired into by state courts. *Sindall et al. vs. Thacker & Co. et al.*, 51.
3. Issue to be tried being sufficiency of affidavit to foreclose lien of owner of saw-mill; affidavit lost, and plaintiff put on terms to establish copy by certain day or case to be dismissed; on failure to comply case dismissed. *McLoughlin vs. King*, 213.
4. *Nunc pro tunc* judgment not entered on parol evidence alone, where there is no entry anywhere showing disposition of case. *Robertson vs. Pharr*, 245.
5. Contract described in declaration as made with plaintiff, too late, after verdict, to object that it was made with plaintiff and others jointly, no plea in abatement having been filed nor objection to testimony made. *Mahone vs. Bryant*, 294.
6. Justification pleaded to action for libel, defendant entitled to open and conclude; nor is right forfeited by fact that he withdrew plea at beginning of trial and did not renew it until plaintiff had made out *prima facie* case. *Ransone vs. Christian*, 351.
7. State legal position to jury, counsel may. *Ibid.* See *Warmock, vs. State*, 503.
8. Requests which court designs to refuse should not be read to jury. *Ibid.*
9. Question propounded by prosecution subsequently withdrawn, refusal to allow answer to be recorded not such abuse of discretion as to require new trial. *Carter vs. State*, 463.
10. Party dies, another, not his legal representative, takes his place on express condition that opponent shall lose no right thereby, same evidence admissible as if legal representative had been made a party. *Power et al. vs. Sav. S. & S. R. R. Co.*, 471.
11. *Certiorari* from city court of Savannah, practice as to exceptions and traverse of return. *Tyler Col. P. Co. vs. Chevalier*, 494. *Hacker & Maloney vs. Groover, Stubbs & Co.*, 505.

12. City court refusing or neglecting to supervise and approve such a record of exceptions as will fairly present case for review, compelled by *mandamus*. *Ibid*.
13. Judge of city court of Savannah, in answer to *mandamus* requiring him to send up proceedings on writ of *certiorari*, stated that he could not comply with order as facts had passed from his recollection, the trial having been had several years since, and no statement of facts having been filed or presented for his approval. Motion to dismiss *certiorari*, without calling on defendant to show cause to the contrary, should have been overruled. *Hacker & Maloney vs. Groover, Stubbs & Co., 505.*
14. New trial, to order case to be sent back for, error. *Ibid*.
15. *Certiorari*, final judgment rendered in superior court where no question of fact is involved. *Hallett, Seaver & Burbank vs. Blain & Harris, 525.*
16. Evidence makes case other than that presented by bill, no recovery had. *Rakestraw et al., ex'rs, vs. Brogdon, 549.*
17. Trial cannot proceed without presence of papers or of established copies. *Morris vs. Ogles, 592.*
18. Counter-affidavit to enforcement of mechanic's lien, with other papers in case, returned by sheriff to clerk's office, become office papers of the superior court. Copies established on motion. *Ibid*.
19. Presume in supreme court that superior court had ample evidence that copies established were true copies. *Ibid*.
20. County judge, acting also as jury, may hear additional evidence after dinner though case was closed before, the defendant not making it appear that he was thereby injured. *Ridling vs. State, 601.*
21. Verdict in favor of only litigating defendant returned, and jury remanded to find *pro forma* as to other defendants, too late for plaintiff to dismiss. *Meador vs. Dol. Sav. Bank et al., 605.*
22. Non-suit refused where there is some evidence to support plaintiff's case. *Irby vs. Gardner, 643.*
23. Bill filed to correct credit improperly placed on notes for purchase money of land and to sell latter to pay balance due. Error to require complainant to elect whether he would proceed for the purchase money or for the land. *Davis, ex'r, vs. Clark et al., 681.*

PRACTICE IN THE SUPREME COURT.

1. Imperfect plea which indicates meritorious defense stricken, directed to be reinstated on terms. *Wright vs. Shorter, 72.*
2. Exceptions *pendente lite* not considered while case is pending below, especially where no errors are assigned thereon. *South Ga. & Fla. R. R. Co. vs. Ayres, 230,*
3. That admission was made, if so stated in charge, taken as true unless otherwise certified. *DeSaulles & Co. vs. Leake, 365.*
4. Where recital of pleadings in bill of exceptions differs from copy in record, latter governs. *McClure et al. vs. Smith, gov., 439.*
5. General objection to testimony not considered where no ground is stated either in bill or record. *McDaniel vs. Edwards, 444.*
6. Part of property levied on subject and part not, judgment finding all subject reversed unless levy is dismissed as to that not subject. *Keaton vs. Tifts, 446.*
7. Entire charge not in record, presumed correct, unless error is manifest from portions of charge given and excepted to. *Woolfolk vs. Mac. & Aug. R. R. Co., 457.*

8. Clerk's certificate to bill of exceptions cannot be waived. *Daniel vs. Donaldson*, 523.
9. Certified transcript of record cannot be waived. *Ibid.*
10. Bill of exceptions forwarded without certified transcript of record, though full copy may be embraced therein, writ of error dismissed. *Lee, ex'r, vs. Anderson, assignee*, 524.
11. Suggestion of diminution cannot be made where there is no authentic portion of record before the court. *Ibid.*
12. Case dismissed for want of certified copy of record, not reinstated on production of receipt forwarded by clerk of this court to clerk of superior court stating that bill of exceptions and transcript of record had been received, accompanied by certificate of latter that from such receipt he believed he had forwarded the transcript. *Ibid.*
13. Bill of exceptions signed neither by plaintiffs nor their counsel, writ of error dismissed. *Speer et al. vs. Merryman & Co.*, 529.
14. Defect cannot be cured by proposition from counsel to sign after it has reached supreme court. *Ibid.*
15. Brief of evidence must be approved by judge in addition to having been agreed upon by counsel. This approval must affirmatively appear. *Porter vs. State*, 530.
16. Question not made in court below not passed on here. *Hawkins vs. Smith, trustee*, 571.
17. Established copies of office papers, presumed in supreme court that superior court had ample evidence that they were true copies. *Morris vs. Ogles*, 592.
18. Erroneous charge certified to have been made, not presumed because entire charge is not in record, that error was cured by subsequent instructions. *Bryson vs. Chisholm*, 596.
19. No clerk's certificate to bill of exceptions, but certificate to record states that accompanying is original bill of exceptions, and both papers reached clerk's office together, writ of error not dismissed. *Charles vs. Foster*, 612.
20. Final judgment, none shown in record, writ of error dismissed. *Smith et al. vs. Cook*, 661.

PREScription.

1. Exceptions specified in Code by which prescriptive title will be defeated, not enlarged by construction. *Jones et al. vs. Bivins et al., executors*, 538.

PRESUMPTIONS.

1. Where it does not appear that party holds back evidence in his power, non-production of more full evidence raises no presumption against him. *Schnell, trustee, et al., vs. Toomer, adm'r, et al.*, 168.
2. No presumption that railroad has authorized local agent to hinder access by counsel of plaintiff to adverse witness in its employ. *Marsh vs. South Carolina R. R. Co.*, 274.
3. Return of service not dated, presumed in time. *Reid vs. Jordan*, 282.
4. Order of discharge not recite that surety on guardian's bond has petitioned, etc., under section 4114 of Code, and these facts do not otherwise appear, but order, on its face, indicates some informal proceeding by consent, no presumption that more was done than is set forth. *Du-pont vs. Mayo et al.*, 304.
5. Declaration in favor of state signed by attorneys, presumed that they had authority of governor. *Alexanders vs. State*, 478.

6. *Certiorari*, presumption is that city court of Savannah will supervise and approve such a record of exceptions and facts as will fairly present case. *Tyler Cotton Press Co. vs. Chevalier*, 494.
7. That magistrate will administer law correctly, presumed. *Endres et al. vs. Lloyd et al.*, 547.
8. Supreme court will presume that superior court had ample evidence that established copies were true copies. *Morris vs. Ogles*, 592.
9. Erroneous charge certified to have been made, not presumed because entire charge is not in record, that error was cured by subsequent instructions. *Bryson vs. Chisholm*, 596.
10. Employees not directly concerned in running of trains, not presumed to know schedule. *Georgia R. R. and Banking Co. Rhodes*, 645.

PRINCIPAL AND AGENT.

1. Life insurance company, agent of has no authority to contract that premium shall be paid in medical services. *Carter vs. Cotton States Life Ins. Co.*, 237.
2. Note, nothing on face of to show that maker was acting as agent, he is personally liable and principal not bound. *Graham vs. Campbell et al.*, 258.
3. Addition of word "agent" not change this rule where principal is not disclosed. *Ibid.*
4. Improper acts touching matters out of scope of agency, not imputed to principal. *Marsh vs. So. Ca. R. R. Co.*, 274.
5. Corporation unaffected by conduct of agent tending to prevent access of counsel for plaintiff to witness in its employ, unless authority thus to act be shown. *Ibid.*
6. Declarations of employee of railroad company who saw homicide of other employee, made immediately thereafter, not affect company. *Ibid.*
7. Railroad stock bought from trustee and sold to innocent purchaser for value; agent of first purchaser caused transfer to be made on books; notice to him of claim of *cestui que trust*, not notice to second purchaser. *Stinson vs. Thornton, adm'r*, 377.
8. Guardian had authority, under act of December 11th, 1862, to appoint agent to act for him during his absence in Confederate army. *Tarpley et al. vs. McWhorter, guardian*, 410.
9. Possession of notes alone not conclusive evidence of agency to accept payment of same, where it was known to the parties that notes belonged to the ward, and that the title was in the absent guardian. *Ibid.*
10. Officer of state paying money, acting in collusion with partner to whom paid on fraudulent claims, state cannot recover from firm, other partners being innocent of dishonest transactions. *Alexanders vs. State*, 478.
11. Declarations of agents of railroad inadmissible to bind company unless made in particular business entrusted to them, and while engaged in such business. *Evans & Ragland vs. At. & W. P. R. R. Co.*, 498. *Marsh vs. S. C. R. R. Co.*, 274.
12. Sayings of general agent of administratrix who subsequently died, admissible to bind estate. *Hines, adm'x, vs. Poole*, 638.

PRINCIPAL AND SECURITY.

1. Guarantor who has received value in negotiating note, not discharged by judgment in favor of maker unless the result of fault of plaintiff; latter not bound to pursue case to adverse termination in supreme court of United States. *Wright vs. Shorter*, 72.

2. Verdict against both defendants, finding one to be security, judgment against "the defendant" construed to include both. *Suffold vs. Wade, ex'r, 174.*
3. Amendments of judgment and execution to cure defects of which security had previously complained by illegality, which had been sustained, may be made without notice to him, especially where for his protection. *Ibid.*
4. Illegality by security after amendments, based on grounds which had been thus cured, properly overruled. *Ibid.*
5. Execution against principal and security; levy on property of one prevents dormancy of judgment as to both. *Ibid.*
6. Sheriff having taken bail and discharged prisoner, has no authority, subsequently and before returning bond to clerk's office, to stipulate with securities to add other sureties to bond, and his failure to comply will not bar judgment of forfeiture. *McClure et al., vs. Smith, gov, 441.*
7. *Nolle prosequi* entered; there can be no forfeiture of bond to answer that bill. *Lamp vs. Smith, gov., 589.*
8. Assignee of two judgments, upon order of which there is security, must apply money collected from sheriff's sale to order, otherwise surety will be discharged *pro tanto*. *Simmons vs. Cates et al., 609.*
9. Fact that assignee was purchaser of property sold and did not pay money, but considered it paid, makes no difference. *Ibid.*

PROCESS. See *Service, 4, 6, 9.*

RAILROADS.

1. Employee, free from fault himself, may recover for negligence of co-employee. *Geo. R. R. & B'k'g Co. vs. Goldwire, 196. Marsh vs. South Car. R. R. Co., 274.*
2. Corporation unaffected by conduct of local agent tending to prevent access by counsel for plaintiff to witness in its employ, unless authority thus to act be shown. *Marsh vs. South Car. R. R. Co., 274.*
3. Extraordinary diligence for protection of passengers, railroad bound to exercise; this done, not liable for injuries. *Brun. & Alb. R. R. Co. vs. Gale, 322.*
4. Receiver, company not liable to employee for injury sustained while in hands of. *Thurman vs. Cherokee R. R. Co., 377.*
5. Stock killed, even in pasture enclosing railroad, presumption against the company. *Woolfolk vs. Mac. & Aug. R. R. Co., 457.*
6. Declarations of agents of railroad inadmissible to bind company unless made in particular business entrusted to them, and while engaged in such business. *Evans & Ragland vs. At. & West P. R. R. Co., 498. See Marsh vs. S. C. R. R. Co., 274.*
7. Agents of connecting roads may be agents of road sued to make indorsements on bill of lading as to condition of corn passed over line, but fact that road sued is one of connecting line, and under contract with others in respect to carriage of freight, must appear. *Ibid.*
8. Indorsement of agent on bill of lading, made some time after reception of goods, inadmissible to show that company received corn in good order, unless accompanied by proof that it was his business so to act on reference of the matter to him. *Ibid.*
9. Bill of lading executed at St. Louis by agent of steamboat in which corn to be transported to LaGrange, Georgia, is recited to be in good order, does not show that last road received same in such condition,

- in absence of proof that it was one of line under contract with steamboat and thus bound by act of latter's agent. *Ibid.*
10. Proof that goods in good order are received on any railroad of a connecting line, presumption is that such condition continued until received by last company. *Ibid.*
 11. Domestic animals and railroad trains equally free to pass over unenclosed lands; in case of collision, diligence of respective owners material. *Geo. R. R. & B'k'g Co. Neely, 540.*
 12. Stock killed, what will excuse and what will mitigate. *Ibid.*
 13. Proposition in section 2972 of Code that if plaintiff could have avoided injury, he cannot recover on account of defendant's negligence, does it apply to other than personal injuries. *Ibid.*
 14. Full diligence established by company in this case. *Ibid.*
 15. Negligence is matter of fact, not of law. *Ibid.* See *Woolfolk vs. Mac. & Aug. R. R. Co., 457.*
 16. Employee to recover must show himself free from fault, or negligence in co-employees. Cases in 53 *Georgia Reports*, 488, and 54 *Ibid.*, 506, compared and reconciled. *At. & Rich. A. L. R. Co. vs. Campbell, 586.*
 17. Baggage master upon train in imminent danger of collision jumps therefrom and is injured; no defense for company that conductor ordered him not to jump. *Geo. R. R. & B'k'g Co. vs. Rhodes, 645.*
 18. Employee assumes risks necessarily incident to occupation, but not such as result from negligence of co-employees. *Ibid.*
 19. Employee not directly concerned in running of trains, not presumed to know schedules. *Ibid.*
 20. Employee injured from negligence of co employees, verdict not readily interfered with. *Ibid.*

RECEIVER. See *Equity*, 18, 20; *Injunction*, 2, 3, 5, 6, 22, 23, 28, 29; *Railroads*, 5.

RECOUPMENT. See *Set-off and Recoupment*, 3.

REMAINDERS. See *Administrators and Executors*, 2.

RESCISSION. See *Equity*, 28.

REVIEW—BILL OF. See *Equity*, 12, 13.

ROADS.

1. Public road upon land which was known to vendee at time of purchase, not constitute breach of warranty against incumbrances. *Desvergers et al. vs. Wilkes, adm'r, 575.*
2. Public road, portion of assigned under section 621 *et seq.* of Code, person receiving assignment becomes *quasi* commissioner, and must be punished for neglect of duty in same manner as commissioner. *Patillo vs. Cutliff et al., 689.*
3. Commissioners' court would have no jurisdiction in such case. *Ibid.*

SALES.

1. Goods ordered are, after acceptance, presumed to be of quality ordered. Burden of showing inferiority is on purchasers, and this must be done with that degree of certainty which usually suffices in civil cases. *Atkins & Co. vs. Cobbs, 86.*

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2. Partial payment by purchasers, with knowledge of defective quality, not prevent this defense. *Ibid.*
3. Abatement of purchase money should be equal to difference between agreed price and actual value; and this whether purchasers lost anything or not. *Ibid.*
4. For a sale to illustrate value, medium of payment as well as price should be regarded. *Ibid.*
5. Where bill claims proceeds of sales made in a Confederate transaction, error to decree for value of goods in United States currency at time when they ought to have been accounted for, instead of value of proceeds of fair sale when goods ought to have been sold. *Ayres vs. Daly, 119.*
6. Personalty sold and delivered, no lien implied by law in favor of vendor. *Johnson & Smith et al. vs. Farnum et al., 144.*
7. Right to rescission for fraud must be claimed before equity will treat sale as rescinded. *Ibid.*

SEAL. See *Claim, 6; Equity, 26.*

SERVICE.

1. Return of service by United States marshal should be treated as conclusive in state courts. *Sindall et al. vs. Thacker & Co. et al., 51.*
2. Service at house where defendant left his family, especially when they are still in same city, and when, though the wife has sold the house and furniture, she has not delivered all the latter nor parted with possession of the house, is valid. *Ibid.*
3. Appearance of defendant and plea to merit cures all irregularities in service. *Ibid.*
4. Process in equity which commands attendance on certain day under penalty of law, valid. *Dalt. and Morg. R. R. Co. vs. McDaniel et al., 191.*
5. Private person, service of bill by, with affidavit verifying same, valid. *Ibid.*
6. Appearance, demurrer and answer cures irregularity in process and service. *Ibid.*
7. Return of service not dated, presumption is that it was perfected in time. *Reid vs. Jordan, 282.*
8. Appearance and pleading waived service before adoption of Code. *Blalock vs. Tidwell, 517.*
9. Process in name of Hon. James M. Clark, of said court, leaving out the word "judge," valid. *Chappell vs. Boyd et al., 578.*

SHERIFF. See *Levy and Sale, 5, 13-17; Principal and Security, 6.*

SET-OFF AND RECOUPMENT.

1. Libel, to action for, damages sustained by defendant from assault set-off. *Ransome vs. Christian, 351.*
2. Property-holders who have paid, whether voluntarily or by coercion, illegal taxes in former years cannot set-off such payment against taxes of later years. *Wayne, adm'r, et al., vs. Mayor & Ald. of Sav., 448.*
3. Damages, recoupment of, jury may consider respective short-comings of plaintiff and defendant, and make verdict accordingly. *Hill vs. Sibley, 531.*

4. Judgment in favor of stockholder against company set-off against suit under individual liability clause of charter. *Boyd & Son vs. Hall et al.*, 563.

SETTLEMENT. See *Administrators and Executors*, 9.

STATE.

1. Governor has authority to institute suit for money out of which state has been defrauded. *Alexanders vs. State*, 478.
2. Declaration in favor of state signed by attorneys, presumption is that they had authority of governor. *Ibid.*
3. Estopped from asserting right to her own property, state can only be by legislative enactment or resolution. *Ibid.*
4. Agent of state colluding with member of firm, without knowledge of other partner, to defraud state, latter cannot recover from innocent partner. *Ibid.*
5. Executive warrant on treasurer is not a contract; it is only a license or power, and is revocable before payment. *Fletcher, ex'r, vs. Renfroe, treasurer*, 674.
6. If revocation cannot take place by separate act of governor, it can by joint act of governor and general assembly. *Ibid.*
7. In face of resolution approved by governor, directing treasurer not to pay warrant, *mandamus* will not issue. *Ibid.*

STOCKHOLDERS. See *Corporations*, 1-8, 11.

TAXES.

1. Invalidity of orders levying taxes cannot be urged by collector as ground for failure to pay over money collected thereunder. *Wilkinson vs. Bennett, ord'y, for use*, 290.
2. Not sufficient for collector to show that he has paid money in liquidation of balance due on digest of previous year. *Ibid.*
3. Property-holders who have paid, whether voluntarily or by coercion illegal taxes in former years, have no right to set-off, by injunction or otherwise, such payment against taxes of later years. *Wayne, adm'r, et al. vs. Mayor and Ald. of Sav.*, 448.
4. Discretion of chancellor in use of remedy of injunction to restrain collection of taxes, on questions involving whole system of municipal finance, not interfered with. *Ibid.*

TORTS. See *Actions*.

TRADE—CONTRACT IN RESTRAINT OF. See *Contracts*, 16.

TRESPASS. See *Injunction*, 14.

TROVER.

Although action in short form alleges personalty to be in possession of defendant, whilst proof shows conversion before suit, non-suit not ordered. *Wilkin vs. Boykin*, 45.

TRUSTS.

1. Law of should not be charged unless there is some evidence of a trust. *Wagner, guard., vs. Robinson, 47.*
2. Declaration against trust estate must make case where court of equity would render estate liable. *Winslow, trustee, vs. O'Pry, for use, 138.*
3. Declaration, judgment and execution must specify property constituting estate. *Ibid.*
4. Conveyance to trustee for use of wife for life, and at her death for use of issue, the wife nevertheless to have the power of selling and passing title by her own deed; should she die leaving no issue and no will, trustee to hold for certain designated persons, etc., vests legal title in trustee, and if he was barred by statute of limitations, so was the wife and remaindermen. *Schnell, trustee, et al. vs. Toomer, adm'r, et al., 168.*
5. Mature man, income of property vested in trust for, subject to his debts. *Bailie & Bro. vs. McWhorter et al., 183.*
6. Wife and children not necessary parties to bill, husband being alone interested in income. *Ibid.*
7. Trustee being dead and no successor appointed, income made liable through a receiver. *Ibid.*
8. Lien for supplies with which to make a crop, trustee no authority to create. *Taylor & Co. vs. Clarke et al., 309.*
9. Conveyance to husband for use of wife and children, born and to be born, clothes him with executory trust, which does not become executed so long as coverture subsists and children are minors. *Boyd et al. vs. England, 598.*
10. Executory, so long as trust is, legal title cannot vest in beneficiaries. *Ibid.*
11. Trustee not removed and successor appointed in proceeding to which former is not a party. *Ibid.*
12. Wife, suing for herself and as next friend for children, cannot, pending coverture, recover land at law from purchaser from husband as trustee, without bringing latter in as party, and without proving such facts and submitting to such terms, etc., as would entitle her to a decree in equity. *Ibid.*
13. Note by trustee not sufficient to warrant recovery against trust estate. Existence of trust estate, of what it consists, and specific facts which render it liable for the debt must be established. *Gaudy, trustee, vs. Babbitt et al., adm'rs, 640.*
14. Trustees deal with each other, both believing that authority exists for one to purchase from the other a full tract of land, when such authority only extends to part of the tract, the trust estates will be tenants in common, the vendee owning, when paid for, all that could be legally purchased, and the vendor the balance. *Grimes et al. vs. Little, trustee, et al., 649.*
15. After land has greatly depreciated, partition, and not rescission, proper remedy for adjusting equities. *Ibid.*
16. Land should be divided by metes and bounds according to actual value; if that cannot be done it should be sold and the proceeds divided. *Ibid.*

UNITED STATES COURTS.

1. Return of service by marshal treated as conclusive in state courts. *Sindall et al. vs. Thacker & Co. et al., 51.*

2. Questions of amendments and irregularities in connection therewith in courts of the United States, are matters of practice in those courts, and will not be inquired into by the state courts. *Ibid.*

USURY. See *Interest and Usury*.

VENDOR AND PURCHASER.

1. Part of purchase money paid and bond for title given; judgment obtained for balance and *fi. fa.* levied on land, deed having been first filed in clerk's office. Wife of vendee cannot set up right to have money paid by husband refunded, on ground that it was hers, by claim, without proving insolvency of vendor. *Boyd vs. Chappell*, 22.
2. Waste of land and use of profits by vendee enjoined at instance of vendor, and receiver appointed, where former holds under bond for title, having paid no part of purchase money, and from peculiar facts there is danger of latter's losing debt. *Tufts vs. Little*, *adm'r*, 139. *Gunby vs. Thompson*, 316. *Chappell vs. Boyd et al.*, 578. See *Johnson & Smith et al. vs. Farnum et al.*, 144. *Mayer et al. vs. Wood, March & Co. et al.*, 427, and *Worrill et al. vs. Coker*, 666.
3. Assignee of bond for title acquires only rights of assignor, and takes land subject to all claims of vendor. *Scroggins vs. Hoadley*, 165.
4. Section 3654 of Code authorizing filing of deed, etc., covers case where plaintiff in judgment is transferee of notes for purchase money; and it makes no difference that deed has been made by vendee to assignee. *Ibid.*
5. Though bond obligated vendor to make deed so soon as certain payments were made and notes given, which condition has been complied with, land may nevertheless be sold under judgment. *Ibid.*
6. Warranty by vendee to vendor, former cannot recover against latter for breach; nor can he transmit such right by conveying land with warranty. *Willis et al. vs. McGough & Co.*, 198.
7. Lien on land conveyed in 1870, vendor has none, nor is he entitled to priority in distribution of assets of deceased vendee. *Jones vs. Jones*, *adm'r*, 325.
8. Bond for title given and notes for purchase money transferred with indorsement of vendor thereon, latter has no right, because of suit on indorsement, to enjoin sale of land. *Williams vs. Stewart et al.*, 663.
9. Exchange for lands in Florida, failure to examine same not debar defendant from setting up false and fraudulent representations of complainant as ground for relief. *Bryan vs. Suggs*, 679.

VENUE.

1. Crime, venue of must be established beyond all reasonable doubt. *Gosha vs. State*, 36.
2. Residence of family is legal venue of husband; wife cannot, in his absence and without his assent, change that residence so as to change his venue. *Sindall et al. vs. Thacker & Co. et al.*, 51.
3. Cause of action, none alleged against party residing in county of suit, case dismissed though cause of action be set forth against non-resident defendants. *Lester et al., adm'rs, et al. vs. Mathews*, 655.

VERDICT.

1. Jury not obliged to stop precisely where testimony becomes silent, but from facts proven, or from absence of counter-evidence, may infer ex-

istence of other facts. Verdict is compounded of evidence, law and logic. *Mahone vs. Bryant*, 294.

2. Consent decree or verdict cannot be amended on suit at common law for fees so as to cover same. *Lester et al., administrators, et al. vs. Matthews*, 655.

WAIVER.

1. Homestead, waiver of by mortgagor binding. *Simmons vs. Anderson*, 53.
2. Appearance and pleading to merits cures all irregularities in service. *Sindall et al. vs. Thacker & Co. et al.*, 51; *Dal. & Morg. R. R. Co. vs. McDaniel et al.*, 191.
3. Contract described in declaration as made with plaintiff, too late, after verdict, to object that contract introduced was made with plaintiff and others jointly, no plea in abatement having been filed, nor objection to evidence made. *Mahone vs. Bryant*, 294.
4. Traverse of plaintiff's affidavit in attachment not waived by afterwards pleading to the merits. *Parker vs. Brady*, 372.
5. Appearance and pleading waived service before adoption of Code. *Blalock vs. Tidwell*, 517.
6. Clerk's certificate to bill of exceptions cannot be waived. *Daniel vs. Donaldson*, 523.
7. Certified transcript of record cannot be waived. *Ibid.*
8. Pleadings cannot be waived. *Payne, treasurer, vs. Perkerson, sheriff*, 672. See *Cent. B'k of Ga. et al. vs. Johnson & Smith et al.*, 225.

WARRANTY.

1. Bridge and ferry franchises purporting on face of grant to be exclusive, conveyed with warranty against vendor and his heirs only, purchaser takes risk of grants proving exclusive. *Wright vs. Shorter*, 72.
2. As the grant existed, though not exclusive, there was a subject matter for contract to operate on. That it was less extensive than it was believed to be, only negatives existence of some of supposed attributes of subject matter. *Ibid.*
3. Abatement of price for goods sold with warranty of quality, should be, at least, difference between agreed price and actual value, and this whether the purchasers lost anything or not. *Atkins & Co. vs. Cobbs*, 86.
4. Vendee who has warranted to vendor cannot recover for breach; nor can he transmit such right by conveying with warranty. *Willis et al. vs. McGough & Co.*, 198.
5. Public road upon land which was known to vendee at time of purchase, not constitute breach of warranty against incumbrances. *Desvergers et al. vs. Willis, adm'r*, 515.

WILLS.

1. Loan to wife during natural life of \$5,000 00; at her death to be equally divided between all testator's children and his grand-daughter. Duty of executor to pay widow interest on money during life, and at death to divide as indicated in will. *Lee, ex'r, vs. Chisolm et al.*, 126.
2. Contract for valuable consideration to leave legacy, binding on administrator. *Napier vs. Trimmier, adm'r*, 300.

3. Wife may make will without consent of husband under constitution of 1868 and act of 1866. *Urquhart vs. Oliver*, 344.
4. Instrument in form a deed of gift, and well attested as such, but not legally attested as will, if doubtful in its terms as to time of vesting the estate, should be classed as a deed. *Dismukes, adm'r, vs. Parrott*, 513.

WITNESS.

1. Discretion refusing to allow leading questions on cross-examination, not controlled unless abused. *Burrus & Williams vs. Kyle & Co.*, 24.
2. In suit to charge wife's estate for services, where, at time of trial, husband is dead and wife insane, plaintiff incompetent to show services to have been rendered with their knowledge, etc., or to prove contract with husband in respect thereto. *Wagner, guard'n, vs. Robinson*, 47.
3. Action against married man to recover money under contract to pay plaintiff in case of birth of child \$1,000 00, etc., though made before cohabitation, and repeated after birth, is suit in consequence of adultery, and plaintiff is incompetent. *Sloan vs. Briant*, 59.
4. Receiver competent to prove his account; vouchers not produced unless called for. *Ball, adm'r, et al., vs. Vason, trustee, et al.*, 264.
5. Party introducing cannot ask witness whether he has not made certain statement out of court, unless surprised. *Marsh vs. So. Ca. R. R. Co.*, 274.
6. Leading questions allowed on direct examination because witness is in employ of adverse party, same mode of examination allowed on cross. *Ibid.*
7. Leading question to witness introduced by state, judge may propound. *White vs. State*, 385.
8. Guardian of lunatic ward competent witness in contest between himself and heirs as to administration of ward's estate, the heirs being in life and witnesses. *Tarpley et al. vs. McWhorter, guard'n*, 410.
9. Bill by children of *cestui que trusts* against administrator of purchaser of property sold by trustee, to recover same, and defense is prescriptive title, trustee is incompetent as to what passed between him and purchaser at execution of deed to show that title originated in fraud. *Virgin et al. vs. Wingfield, adm'r*, 474.
10. One party dead, other nevertheless competent to show that consideration of contract inured to benefit of estate of deceased. *Hines, adm'r, vs. Poole*, 638.











